82-5879

Office - Supreme Court, U.S.
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DEC 18 1982
ALEXANDER L. STEVAS,
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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth and Fourteenth Amendments to the United States Constitution tolerate the imposition of a death sentence where, despite Petitioner's request and contrary to the requirements of state law, the state reviewing court did not have before it, and therefore failed to review, substantial portions of the sentencing record and failed to evaluate and reweigh properly that portion of the record that it had?

2. Can the penalty of death be constitutionally imposed where prior convictions which were expressly relied on as a partial predicate for the death sentence had been reversed as unconstitutional?

3. Whether an unbridled evidentiary examination into the circumstances and details of prior crimes, and the consequent elimination of the focused and objective weighing of aggravating and mitigating circumstances demanded by the Eighth and Fourteenth Amendments, can be justified under a state statute which identifies prior convictions but not prior crimes as an aggravating circumstance?

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PETITION FOR A WRIT OF
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COURT OF THE STATE OF FLORIDA

Petitioner Jeffery Joseph Daugherty, an indigent, respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Florida affirming the sentence of death imposed upon him.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Florida is reported at 419 So.2d 1067 (Fla. 1982) and is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3). The judgment of the Supreme Court of Florida was entered on September 14, 1982. The court denied a timely motion for additional time to move for rehearing or clarification on September 30, 1982. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit, granted an extension of time to file the present petition for a writ of certiorari from November 13, 1982, to and including December 13, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments of the United States Constitution and Florida Statutes Annotated Section 921.141. Those provisions are set forth in Appendix B to this petition.

STATEMENT OF THE CASE

A. Indictment and Conviction

According to the record available at the sentencing hearing, in January 1976 Petitioner Jeffery Daugherty, at that time 20 years old, left Michigan in the company of his uncle and a 40 year old woman, Bonnie Heath. While travelling through Florida on March 1, 1976, Daugherty and Heath picked up a hitchhiker, Patricia Lavonne Sailer. Heath and Daugherty then robbed Sailer, and Daugherty shot and killed

her. He was arrested in Virginia on March 20, 1976, and was indicted on August 11, 1980, by a Brevard County, Florida Grand Jury, on five separate counts: first degree premeditated murder, first degree felony murder (robbery), first degree felony murder (kidnapping), robbery and kidnapping. On November 18, 1980, Daugherty pleaded guilty to all five counts.

B. The Sentencing Proceedings

Under the aegis of Florida Statutes Annotated Section 921.141, an evidentiary hearing to determine sentence commenced on November 18, 1980 before the Honorable J. William Woodson and a twelve-person advisory jury.

To support its demand for Daugherty's death through a showing of "aggravating circumstances," the prosecution called seven police witnesses, three to testify concerning the circumstances of the Sailer murder and four to testify about the details of other crimes for which Daugherty had been convicted (including testimony concerning convictions in Pennsylvania that were reversed on appeal). The prosecution also called Petitioner's uncle, Raymond Daugherty, who testified about the events surrounding the several crimes and who gave his impression of his nephew's state of mind on those occasions. Of the sentencing record of 290 pages, approximately 100 were devoted to evidence about these other crimes.

After the State rested the defense presented evidence of "mitigating circumstances." Daugherty and a prison

chaplain testified. Evidence was introduced to demonstrate that Daugherty was not a violent or dangerous person and that his crimes were triggered by emotionally disabling circumstances. The thrust of the evidence was that Daugherty had been alternately abandoned and abused as a child; that a childhood head injury inflicted by his father caused him to suffer severe headaches which he attempted to treat with methaquaaludes; that he was only 20 years old at the time of the crimes; and that, as a result of this complex of factors, he came under the perverse influence of Bonnie Heath, a domineering woman more than twice Daugherty's age. The defense also introduced mitigating evidence relating to Daugherty's remorse for the crimes, his sincere conversion to Catholicism, his suicide attempt in prison, and the fact that he would be required to serve 107-1/2 years in prison before becoming eligible for parole.

At the close of the hearing, on November 20, 1980, a majority of the jury returned three advisory general verdicts recommending a death sentence on each of the three counts of murder.* After expressly considering a presentence investigation report, the evidence from the hearing, and arguments of counsel, the sentencing judge found two aggravating factors: (1) that Daugherty had been convicted of another capital felony or a felony involving the use or threat of violence to the person; and (2) that the murder had been committed for pecuniary gain.** Finding "sufficient"

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* Under the Florida system, the sentencing jury's recommendation is governed by a simple majority rule, Fla. Stat. Ann. § 921.141(3).

** Fla. Stat. Ann. § 921.141 (5)(b) and (f) (1981).

aggravating circumstances and "insufficient" mitigating circumstances, R 311,* on April 27, 1981, the trial judge imposed the death sentence for first degree murder. The court also imposed a life sentence for robbery to run consecutively with the death sentence for murder, and a life sentence for kidnapping to run consecutively with the life sentence for robbery. R 302-303.

C. Proceedings in the Florida Supreme Court

On May 28, 1981, an appeal was taken to the Florida Supreme Court pursuant to the automatic review provision of Florida Statutes Annotated section 921.141(4). However, despite Daugherty's request and the directive of section 921.141(4), the record transmitted to the Supreme Court did not include the presentence investigation report, the trial court's sentencing instructions to the jury, the arguments of counsel, the jury voir dire, and a portion of the evidentiary record.

The Florida Supreme Court found "no error" and affirmed Daugherty's conviction and death sentence for first-degree murder on September 14, 1982. On September 23, 1982, Daugherty filed a timely motion for additional time in which to move for rehearing.** Among the issues raised by that motion were the incomplete state of the record on appeal,

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* The record on appeal to the Florida Supreme Court is designated by an "R" followed by the page number.

** Daugherty's appointed counsel below withdrew from this case prior to the issuance of the judgment of the Supreme Court of the State of Florida. Present counsel first appeared with the motion for additional time filed in the Florida Supreme Court and was formally retained on September 30, 1982.

the fact that one or more of the convictions relied upon by the state as an element of aggravation had been reversed, and the possibility of deficiencies in the then unavailable charge to the sentencing jury. Time to move for rehearing expired on September 29, 1982, and the Florida Supreme Court denied the motion for additional time on September 30, 1982.

D. How The Federal Questions Were Raised and Decided Below

Petitioner requested transmittal of the entire transcript of the sentencing proceedings as part of the record on appeal. R 293, 295. He brought the fact that substantial portions of the appellate record were missing to the attention of the Florida Supreme Court in his Motion for Additional Time in Which to Move for Rehearing or Clarification. The invalidity of the Pennsylvania convictions relied on below as an element of aggravating circumstances was also raised in that motion. The court nevertheless denied Petitioner's request for additional time. During the sentencing proceeding, Petitioner raised the issue of the propriety of admitting evidence concerning the crimes that led to the prior convictions, but the sentencing judge concluded that "[the conviction was] . . . important but also all the facts and circumstances surrounding the offense." TT 146.* Petitioner then challenged the introduction of evidence relating to the other crimes in his appeal to the Florida Supreme Court (Petitioner's Brief at 9), and that court rejected his claim. 419 So.2d at 1069.

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* The record of the sentencing proceeding below is designated by a "TT" followed by the page number.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FLORIDA SUPREME COURT ABROGATED ITS RESPONSIBILITY TO PROVIDE MEANINGFUL APPELLATE REVIEW, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, WHEN IT AFFIRMED DAUGHERTY'S DEATH SENTENCE ON THE BASIS OF A PERFUNCTORY REVIEW OF A SUBSTANTIALLY INCOMPLETE RECORD

To receive the full consideration due under Florida law, Daugherty designated as the record on appeal "the transcription of all Court proceedings occurring in the bifurcated penalty or sentencing phase." R 295. Despite that request and despite the command of the State's death penalty statute that "the entire record" (Fla. Stat. Ann. § 921.141(4)) "shall be subject to automatic review by the Florida Supreme Court" (id.), the court below affirmed Daugherty's death sentence on the basis of a substantially incomplete record, from which were missing: (1) the presentence investigation report; (2) the sentencing instructions to the jury; (3) the sentencing arguments of counsel; (4) the jury voir dire, and (5) a transcript of a forty-minute taped statement by Daugherty that was played at the sentencing hearing. Moreover, the court conducted no independent review of the sentencing record to determine if death was justified by the evidence of aggravation and mitigation. This Court should therefore issue a writ of certiorari in view of the fact that the Florida Supreme Court reviewed the death sentence in a manner "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld." Gardner v. Florida, 430

U.S. 349, 360 n.11 (1977), citing Proffitt v. Florida, 428 U.S. 242, 254 (1976).

A. Petitioner Was Entitled To A Complete Record on Appeal

This Court vacated the death sentence in Gardner v. Florida, 430 U.S. 349, because the Florida Supreme Court had affirmed the sentence on the basis of an incomplete record on appeal. Since "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (430 U.S. at 358), and since "the State must administer its capital-sentencing procedures with an even hand . . . it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Id. at 361 (footnote and citation omitted).

If Florida is to to avoid the constitutional infirmities condemned in Furman, the state Supreme Court must engage in "meaningful appellate review," Proffitt v. Florida, 428 U.S. at 251, of the "'total record,'" Gardner v. Florida, 430 U.S. at 349, quoting Swan v. State, 322 So.2d 485, 489 (Fla. 1975), so that it can independently determine whether the death penalty is warranted, and can ensure that similar results are reached in similar cases. Proffitt v. Florida,

428 U.S. at 253, 258. Indeed, this Court expressly relied on the premise that the Florida Supreme Court would engage in "meaningful" and "responsible" appellate review of the complete record "with a maximum of rationality and consistency," and would not engage in "subjective and unpredictable," "ineffective or arbitrary," or "cursory or rubber-stamp review of death penalty cases," when this Court rejected a facial challenge to Florida's death penalty statute. Proffitt v. Florida, 428 U.S. at 258-59.*

Long before Gardner v. Florida, this Court reversed a non-capital criminal conviction where, as here, the state appellate court denied the indigent petitioner adequate review in affirming his conviction on the basis of an incomplete record, even though under state law he was entitled to and requested a complete record on appeal. Entsminger v. Iowa,

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* Every member of this Court has endorsed the principle that complete and meaningful appellate review is a critical procedural safeguard in the Florida system. In Gardner itself, Justice Powell and Justice Stewart joined in Justice Stevens's plurality opinion reversing the death sentence. 430 U.S. at 351-62. Chief Justice Burger (id. at 362), Justice White (id.), Justice Blackmun (id. at 364), and Justice Brennan (id.) each concurred separately. Justice Marshall agreed that review of a death sentence by the Florida Supreme Court based on an incomplete appellate record "alone is enough to deny due process and require that the death sentence be vacated." Id. at 365 (Marshall, J., dissenting). Justice O'Connor has voted to strike down a death sentence because the Florida Supreme Court failed to engage in meaningful appellate review of the complete record. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 3394 n.46 (1982) (O'Connor, J., dissenting). Justice Rehnquist has asserted that meaningful appellate review is a "crucial protection" that "is by no means perfunctory," and that such review served as a central basis for upholding the Florida death penalty statute on its face in Proffitt. Dobbert v. Florida, 432 U.S. 282, 295 (1977) (Rehnquist, J.). See generally id. at 295-97.

386 U.S. 748 (1967).* The Court held that such a procedure deprived the defendant of "'all hope of any [adequate and effective] appeal,'" 386 U.S. at 752, quoting Lane v. Brown, 372 U.S. 477, 485 (1963) (bracketed material supplied by the Entsminger Court).

Effective appellate review of the complete record is required under Florida law. The Florida death penalty statute mandates that "the judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . after certification by the sentencing court of the entire record." Fla. Stat. Ann. § 921.141(4). The Florida Supreme Court has recognized that it has an independent duty to review the complete record in every death penalty case. Even though the defendant seeks to dismiss his appeal, "[e]ven though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of a death sentence complies with all of the standards set by the Constitution, the Legislature and the courts." Goode v. State, 365 So.2d 381, 384 (Fla. 1979) (construing Fla. Stat. Ann. § 921.141(4)). In capital cases, the Florida Supreme Court has recognized that "[o]ur review is of the entire record of the conviction and the sentence of death"; and that a

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* In Entsminger, the indigent petitioner was, upon request, entitled under state law to a complete record on his first direct appeal at state expense, but only to a clerk's transcript in the absence of such a request. Although the petitioner had requested a complete record, his appointed counsel failed to file the entire record. The State Supreme Court affirmed the conviction on the basis of the clerk's transcript alone. 386 U.S. at 752.

capital defendant "has the right to complete review." Delap v. State, 350 So.2d 462, 463 n.1 (Fla. 1977) (construing Fla. Const. Art. V, § 3(b)(1), Fla. Stat. § 921.141(4) and Fla. App. Rule 6.16) (emphasis added).

B. The Record On Appeal Was Missing Critical Portions

Even though Daugherty was entitled to and requested a complete record on appeal,* the Florida Supreme Court affirmed the death sentence on the basis of a record that did not include substantial portions of the sentencing record, the critical nature of which have been recognized in decisions of both this Court and the Florida Supreme Court:**

(1) The Presentence Report. The Constitution demands that where a presentence report is relied upon by the sentencer it must be examined by the reviewing

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* Pursuant to Florida Rules of Appellate Procedure, Rule 9.140(d), Petitioner designated to the Official Court Reporter "[t]he transcription of all Court proceedings occurring in the bifurcated penalty or sentencing phase" (R 295) and requested that they be filed with the Clerk of the Circuit Court as part of the record on appeal. He directed the clerk of the court to prepare "[t]he complete original record on appeal including, but not limited to, all indictments, motions, orders, minutes of the Court, Court Reporter's transcription of Court proceedings and exhibits entered into evidence." R 293. "Here there was no waiver but, rather, an affirmative and timely request that the record be prepared for our use in performing our duty." Delap v. State, 350 So.2d 462, 463 n.1 (Fla. 1977).

** Daugherty need not address in this Court the possibly prejudicial impact of errors in the missing portions of the record, as it is not the function of this Court to evaluate such material in the first instance. Gardner v. Florida, 430 U.S. 354-55 at n.5; accord, Entsminger v. Iowa, 386 U.S. at 752; Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent criminal defendant entitled to complete transcript without any showing of how transcript could be used).

court. Gardner v. Florida, 430 U.S. at 361. In the present case, the record expressly reflects such reliance by the sentencing judge. R 311.

(2) Jury Voir Dire. Errors during the jury selection process may mandate reversal of a death sentence, and therefore the voir dire must be reviewed. Delap v. State, 350 So.2d at 463 (death sentence reversed because transcript of the voir dire was unavailable). Cf. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 488 U.S. 38 (1980).

(3) Sentencing Arguments By Counsel. Prosecutorial misconduct during summation may require reversal of a death sentence and therefore must be reviewed. Delap v. State, 350 So.2d at 463 (death sentence reversed because transcript of the sentencing arguments was unavailable). The sentencing court here expressly relied on the sentencing arguments. R 311.

(4) Jury Instructions. Erroneous instructions to the jury may require vacation of a death sentence and therefore must be reviewed. Godfrey v. Georgia, 446 U.S. 420 (1980); Henry v. Wainwright, 661 F.2d 56 (5th Cir.), vacated and remanded on other grounds, ___ U.S. ___, 102 S.Ct. 2922, reinstated following remand, 686 F.2d 311 (5th Cir. 1982).

Additionally, the appellate record did not include a transcript of a forty-minute taped statement by Daugherty which

was played but not transcribed at the sentencing hearing.* See TT 94-95. Having relied on the entire evidentiary record of the sentencing proceedings, the trial court (and presumably the jury**) relied on the taped statement in sentencing Daugherty to die. R 311. The taped statement therefore had to be reviewed. See Entsminger v. Iowa, 386 U.S. at 749 (sentence vacated because record on appeal did not include complete transcript of evidence).

Not only did the Florida Supreme Court shirk its responsibility to conduct a complete review, but it displayed an unconstitutional disregard of Daugherty's right to due process before being deprived of his life when it denied his request for additional time to secure a complete record as a predicate to an informed motion for rehearing or clarification.***

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* Although the tape itself is an exhibit in the record on appeal, it cannot be presumed that the justices listened to it. See Gardner v. Florida, 430 U.S. at 359 n.10. At the very least, the State bears the burden of establishing that the Florida Supreme Court reviewed the tape itself. See Mayer v. City of Chicago, 404 U.S. 189, 195, 198-99 (1971).

** During its deliberations, the jury asked to hear the tape again. R 322-23.

*** Because Daugherty, as an indigent, was entitled to a complete transcript at state expense, Griffin v. Illinois, 351 U.S. 12 (1956), the failure of the clerk and court reporter to submit a complete transcript to the Florida Supreme Court is chargeable to the Florida courts, as "courts have supervisory power over the reporter . . . . Courts have an obligation to exercise sufficient oversight of reporters to ensure that proceedings are transcribed with dispatch." Mayer v. City of Chicago, 404 U.S. at 200 n.1 (Burger, C.J., concurring). Cf. Entsminger v. Iowa, 386 U.S. at 750, 752 (where appellant requested that the trial court "transmit the certified records" (id. at 750) to the State Supreme Court, the "bare election" of his appointed counsel on appeal not to file the complete record, without any notice to the reviewing court or to the appellant, did not constitute a

[Footnote continues]

C. The Florida Supreme Court Failed Properly To Weigh And Evaluate Those Portions Of The Record Which Were Before It

Not only did the Florida court act on a substantially and critically incomplete record, but it is apparent on the face of the per curiam opinion that the court engaged in a narrow, limited review of that fragmentary record which it did have. No "independent review" was conducted; no evidence was "reweighed." The court left wholly to the trial court the task of weighing the evidence, noting that "it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it." 419 So.2d at 1071. The court below simply found "supported by the record" the trial court's conclusions that "there were sufficient aggravating circumstances and insufficient mitigating circumstances." Id. "Finding no error," the Florida Supreme Court affirmed. Id.

Daugherty is constitutionally entitled to more than the conventional review given by appellate courts in non-capital cases. The Florida Supreme Court's mandate in death penalty appeals is not just to ensure that the trial court has correctly interpreted the law or that there is support in the record for the lower court's sentencing decision.

[Footnote cont'd]

waiver by the appellant of his right to adequate and and effective appellate review of the complete record); accord, Lane v. Brown, 372 U.S. 477 (1963) (the conclusion of appointed counsel that an appeal would not have any merit is no substitute for full appellate review based on a complete trial transcript).

Rather, the Florida Supreme Court is to provide a "third chance for life," Dobbert v. Florida, 432 U.S. 282, 296 (1977), with an enhanced, thorough review "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt v. Florida, 428 U.S. at 252 (emphasis added; citations omitted). This Court emphasized that the Florida Supreme Court would not, under that system, merely act as a rubber-stamp, but that the "reasons [for the death sentence], and the evidence supporting them, [would be] reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law." Id. at 260.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE CAN BE BASED ON INVALID PRIOR CONVICTIONS

In affirming the death sentence on the basis of the statutory aggravating circumstance that Daugherty "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Fla. Stat. Ann. § 921.141(5)(b), the Florida Supreme Court expressly relied on two prior convictions for the killing and robbery of one George Karnes, 419 So.2d at 1068, despite the fact that those convictions had been reversed as unconstitutional by the Pennsylvania Supreme Court in Commonwealth v. Daugherty, 493 Pa. 273, 426 A.2d 104 (1981), due to prejudicial pretrial

publicity. Those invalid prior convictions infected every level of the "tripartite review" of Daugherty's capital sentence, Dobbert v. Florida, 432 U.S. at 295, as the sentencing judge expressly, and the jury presumably, also relied on them. R 312. The prosecution presented extensive evidence before the jury of the facts and circumstances concerning those crimes.*

This Court vacated the sentence in United States v. Tucker, 404 U.S. 443 (1976), on the ground that an unconstitutional prior conviction cannot be considered as a factor in discretionary sentencing. A sentence must be vacated and remanded for a new sentencing proceeding without consideration of any invalid prior convictions where, as here, the sentence is "founded at least in part upon misinformation of constitutional magnitude. . . . The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional . . . ." 404 U.S. at 447.** Cf. Burgett v. Texas, 389 U.S. 109 (1967) (invalid

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* This Court has granted certiorari to determine whether a death sentence should be reversed if the sentencing authority expressly relies on an unconstitutional aggravating factor. Whether or not a death sentence is permissible where the sentencing body alone relies on an invalid aggravating factor, the death sentence here is manifestly unconstitutional because the reviewing court itself expressly relied on the unconstitutional prior convictions. See Zant v. Stephens, No. 81-89, cert. granted, ___ U.S. ___, 50 U.S.L.W. 3244 (Oct. 5, 1981), question certified to Georgia Supreme Court, ___ U.S. ___, 102 S.Ct. 1856 (1982). See also Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3362 (Nov. 8, 1982).

** Accord, e.g., Stromberg v. California, 283 U.S. 359 (1931), Yates v. United States, 354 U.S. 298, 311-12

[Footnote continues]

prior conviction cannot be used to enhance punishment under a recidivist statute); Lopez v. Beto, 405 U.S. 473 (1972) (invalid prior conviction cannot be used to impeach defendant's credibility); Townsend v. Burke, 334 U.S. 736, 741 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his record which were materially untrue"). This rule prohibiting the use of invalid prior convictions applies with particular force here because of the greater need for reliability in capital cases. Beck v. Alabama, 447 U.S. 625 (1980).

The Florida Supreme Court disregarded Tucker and departed from its own precedents in the present case. The Florida Supreme Court has held that the word "convicted" in the present statutory aggravating circumstance must be construed to mean "a valid guilty plea or jury verdict of guilty." McCrae v. State, 395 So.2d 1145, 1154 (Fla. 1980) (construing Fla. Stat. Ann. § 921.141(5)(b)) (emphasis added). Accord, Perry v. State, 395 So.2d 170 (Fla. 1980); Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Spaziano v. State, 393 So.2d 1119 (Fla. 1981). See also Wolfe v. State, 323 So.2d 681 (Fla. Dist. Ct. App. 1975) (case must be remanded for sentencing

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[Footnote cont'd]

(1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). In Street v. New York, Justice Harlan concluded that "even assuming that the record precludes the inference that appellant's conviction might have been based solely on an [unconstitutional ground] . . . , we are still bound to reverse if the conviction could have been based upon both [an unconstitutional ground] . . . and [a constitutional ground]." 394 U.S. at 587 (emphasis in original).

reconsideration because judge could have been influenced by an invalid prior conviction since it had been specifically called to his attention); Hicks v. State, 336 So.2d 1245 (Fla. Dist. Ct. App. 1976) (re-sentencing is mandatory where sentencing judge considered invalid prior conviction in enhancing sentence); accord, Jenrette v. Wainwright, 410 So.2d 575, 578 (Fla. Dist. Ct. App. 1982) Wilcox v. State, 269 So. 2d 420 (Fla. Dist. Ct. App. 1972).

It is not for this Court to determine whether Daugherty's death sentence "might have been different" if the Florida Supreme Court had not expressly relied on the invalid prior convictions in affirming the death sentence. United States v. Tucker, 404 U.S. at 448. Nor can be it be concluded, except by speculation, that the sentencing judge and jury would have weighed the mitigating and aggravating factors with the same result in the absence of the invalid prior convictions, simply because other factors were also weighed in the balance. Indeed, the prosecution put on extensive evidence of the facts and circumstances of the crimes underlying those convictions, with testimony reconstructing the crimes (TT 128-30, 148-55), the location, number and characteristics of the bullet wounds to the victim (TT 149), the age of the victim (TT 149), and the original trial (TT 150-55). During cross-examination, the prosecutor had Daugherty re-enact the crimes (TT 246-51).

Under these circumstances, an after-the-fact reconstruction of the required weighing process cannot be performed:

> Would the result of the weighing process by both the jury and the judge [-- and the reviewing court --] have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [invalid aggravating factor] . . . shall not be considered.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); accord, Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976).

In the present case there was no "informed . . . inquiry into the question of whether [Petitioner] should be sentenced to death" by the sentencing judge and jury, and by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. at 259. "For we deal here, not with a sentence imposed in the informed discretion of a [sentencing body and reviewing court], but with a sentence founded at least in part upon misinformation of constitutional magnitude" -- Petitioner's unconstitutional prior convinctions. United States v. Tucker, 404 U.S. at 447. The process in which the death penalty was imposed in this case was not "rationally reviewable," and not rationally reviewed by the Florida Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Daugherty's death sentence must be vacated and remanded for a new sentencing proceeding without consideration of the invalid prior convictions.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A STATUTORY SCHEME WHICH ESTABLISHES PRIOR CONVICTIONS AS AN AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS IF USED, AS HERE, TO PERMEATE THE SENTENCING PROCEEDING WITH DETAILS OF THE UNDERLYING CRIMES

This Court has concluded that Florida's capital punishment statute is structured to assure that "after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, 428 U.S. at 259. A defendant's right to such an inquiry is a basic tenet of the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.") Daugherty has been denied the focused and objective penalty phase inquiry to which he is entitled.

Essentially all of the State's evidence which related to a statutory aggravating circumstance concerned Daugherty's record of prior criminal acts. The State offered that record under the guise of establishing the second statutory aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or

threat of violence to the person."* Virtually every detail of each of the underlying crimes was the subject of graphic and often cumulative testimony, including the age and sex of each victim (TT 99, 105, 107-08, 115, 132, 134, 149), the race of two of the victims (TT 99, 105), the probable sequence of events preceding the criminal acts (TT 109, 127-29, 133-37), the numbers of stabbings or gunshots involved in the other murders (TT 99, 106-08, 115, 133, 134, 149), the range at which the shootings took place (TT 106-07, 116, 149, 155-56) and even subjective impressions of witnesses as to the amount of blood lost by the victims (TT 105, 107, 134). The lurid details elicited by the prosecution served no purpose other than to inflame the passions of both judge and jury, thus calling into question whether the resulting death sentence was impermissibly based on caprice or emotion.** See Beck v. Alabama, 447 U.S. at 637-38; Gardner v. Florida, 430 U.S. at 357-58 (opinion of Stevens, Stewart and Powell, JJ.). The evidence and argument regarding each of the crimes for which Daugherty had previously been convicted inevitably confused the jury as to the ultimate issue by

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* The court found one other aggravating circumstance, that the capital offense had been committed for pecuniary gain, as it involved a robbery of fifteen dollars and luggage.

** Even where a defendant's prior record is relevant, detailed evidence of the underlying facts and circumstances of prior crimes serves only to incite a jury. See, e.g., United States v. Cox, 536 F.2d 65, 71 (5th Cir. 1976) ("Even if the prosecution did have the right to introduce the fact of appellant's conviction . . . , the execrable details of this activity were completely immaterial, irrelevant, highly prejudicial and inadmissible").

transforming the proceedings into seven mini-trials on the totality of Daugherty's conduct during February and March of 1976.*

The confusion interjected into the presentence hearing by the introduction of such wide-ranging testimony was exactly the type of problem the Florida legislature seemingly precluded by structuring the aggravating circumstance at issue in terms of "convictions" rather than "crimes." "Prior convictions" has been consistently interpreted by Florida's highest court to mean convictions which preceded the sentencing hearing at which those convictions are sought to be used as aggravating evidence. King v. State,

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* In the words of the prosecuting attorney to Daugherty on cross-examination (TT 220):

> What we are concerned with in this courtroom, in this proceeding, and what you're on trial for is your conduct basically on the first day of March as relates to Brevard County, and the other incidents that take (sic) place during the time span I keep referring to, from February to March, so I realize you want to put it out of your mind but we have a right to know about you as an individual then, because the crimes you're answering for are those crimes and not what you've done today.

See also TT 211-12.

Retrying each of a defendant's prior convictions gives rise to a real danger that defendants who have prior criminal records will be, for all intents and purposes, systemically denied effective assistance of counsel at the sentencing phase. It is asking the impossible to expect a court-appointed attorney with a local practice to competently present a defense to aggravating evidence of prior crimes, as against the resources of a state like Florida, which, in this case, produced law enforcement officers from Pennsylvania to testify in great detail regarding crimes committed in that State. Under such circumstances, the guarantee of effective assistance of counsel is illusory.

390 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). Such an explicit interpretation rules out any notion that evidence of the underlying crimes may also be used by the State in aggravation. The use of such evidence against Daugherty constituted a denial of his right to procedural due process during the sentencing phase, Gardner v. Florida, 430 U.S. at 358, with the concomitant result that imposition of the death penalty was arbitrary and capricious in violation of the Eighth and Fourteenth Amendments. Id. at 364 (White, J. concurring).

CONCLUSION

For the reasons and on the authorities stated above, Petitioner respectfully requests that a writ of certiorari issue to review the decision of the Florida Supreme Court.

Dated: December 13, 1982

Respectfully submitted,

James E. Daniels

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DONOVAN LEISURE NEWTON & IRVINE

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this petition for a writ of certiorari upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

Jim Smith, Esq.
Attorney General
Department of Legal Affairs
Suite 1502 - The Capitol
Tallahassee, Florida 32301

C. Michael Barnette, Esq.
Assistant Attorney General
125 North Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32104

Sid J. White, Clerk
Florida Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Done this 13th day of December, 1982.

James E Daniels

James E. Daniels, Esq.

should begin to run. *Casto* was decided after the district court's decision in *Grabarnick*.

We quash the decision of the district court dismissing the appeal as untimely and remand the cause for further consideration in accordance with the views expressed in *Casto* and this opinion.

It is so ordered.

BOYD, OVERTON and SUNDBERG, JJ., concur.

McDONALD, J., dissents with an opinion, with which ALDERMAN, C. J., concurs.

McDONALD, Justice, dissenting.

I dissent. We made a mistake in *Casto v. Casto*, 404 So.2d 1046 (Fla.1981), and this case gives us a vehicle to correct that error. The time for filing a petition for rehearing should commence to run when the judgment sought to be reheard is filed with the clerk of the court. The Third District Court of Appeal correctly dealt with this issue in *Dibble v. Dibble*, 377 So.2d 1001 (Fla.3d DCA 1979). We should adopt that opinion and dispose of this case accordingly.

ALDERMAN, C. J., concurs.

Jeffrey Joseph DAUGHERTY, Petitioner,

v.

STATE of Florida, Respondent.

No. 60709.

Supreme Court of Florida.

Sept. 14, 1982.

Defendant was convicted in the Circuit Court, Brevard County, J. William Woodson, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) it was not error to permit State to introduce, in death penalty sentencing phase of capital murder prosecution, defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced; (2) evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity; and (3) record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

Affirmed.

1. Homicide ⇐254

It was not error to permit State to introduce in death penalty sentencing phase of capital murder prosecution defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced. West's F.S.A. § 921.141(5)(b).

2. Criminal Law ⇐965.2(4)

Evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity.

3. Homicide ⇐354

In sentencing phase of capital murder prosecution, record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's

participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

4. Homicide ⇐354

In sentencing phase of capital murder prosecution, it was not error to fail to find nonstatutory mitigating factors of defendant's claimed remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and defendant's ineligibility for parole for 107½ years.

5. Criminal Law ⇐1208(1)

It is within province of trial court to decide whether particular mitigating circumstance in sentencing has been proven and weight to be given it in determining whether to impose death penalty.

Arthur J. Kutsche, of the Law Offices of A. J. "Sonny" Kutsche, Titusville, for petitioner.

Jim Smith, Atty. Gen., and C. Michael Barnette, Asst. Atty. Gen., Daytona Beach, for respondent.

PER CURIAM.

Jeffrey Joseph Daugherty appeals his conviction and sentence of death for the first-degree murder of Lavonne Patricia Sailer. We affirm.

Daugherty, along with his girl friend Bonnie Heath and his uncle, left Michigan in January 1976 and traveled to Florida purportedly to look for jobs and to visit Heath's children. On February 23, 1976, he robbed an Easy Way food store and shot and killed Carmen Abrams and seriously wounded her husband. Continuing on a killing and robbing spree, on March 1, 1976, Daugherty and Heath picked up Lavonne Sailer who was hitchhiking in Melbourne, Florida. They took her to an isolated area near the Brevard County dump where Daugherty told her to get out of the car and robbed her. He then shot her five times at close range with a .22 caliber pistol. They then returned to the nearby bar to pick up Daugherty's uncle. Thereafter for a twenty-day period, Daugherty, along with Heath, continued on a course of robberies and murders, several of which he was convicted and for which he was sentenced prior to being convicted and sentenced for the Sailer murder.

Daugherty pled guilty to the first-degree murder, robbery, and kidnapping of Sailer. A jury was then impaneled for the sentencing phase. The jury recommended a sentence of death, and the judge imposed the death sentence for the first-degree murder and life sentences for the robbery and kidnapping. The trial court found as an aggravating factor that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. It enumerated the previous convictions as follows:

(1) The defendant was convicted and sentenced on July 31, 1980, for First Degree Murder in Flagler County, Fl. where he shot and killed a white female in her sixties by shooting her in her left shoulder and right temple during the course of robbing the victim.

(2) The defendant was sentenced on July 14, 1980, for the Murder of a white female by the name of Campbell whom he stabbed after he had robbed her place of business in Volusia County, Fl.

(3) The defendant was convicted and sentenced on September 29, 1978, for Criminal Homicide, Criminal Conspiracy, Robbery and crimes committed with firearms. The defendant robbed a gas station and in the process shot the young attendant twice in the side, once in the bridge of the nose and once under the chin.

(4) The defendant was convicted and sentenced on January 4, 1980, for Robbery, Aggravated Assault, Simple Assault and crimes committed with firearms. In Altoona, Pa. the defendant robbed a woman clerk at Rich's Music Store with a firearm and in the process assaulted the woman a number of times until she lost consciousness.

(5) The defendant was convicted and sentenced on September 29, 1978, in the State of Pennsylvania for the crimes of Simple Assault, Aggravated Assault, Burglary, Robbery and crimes committed with firearms.

(6) The defendant was convicted and sentenced on July 12, 1976, in the State of Virginia for Armed Robbery and using a firearm while committing a felony.

(7) The defendant was convicted and sentenced on January 4, 1980, for Criminal Conspiracy, Robbery and Criminal Homicide. The defendant robbed one Betty Shank at a Jack's Kwik-Mart in Blair County, Pa. and in the process killed the clerk by shooting her in the body and head.

The trial court also found as an aggravating circumstance that the murder was committed for pecuniary gain. Weighing the aggravating and mitigating circumstances, it concluded the death sentence is justified because there are sufficient aggravating circumstances and insufficient mitigating circumstances.

Daugherty does not challenge his plea of guilty to the charges against him. The transcript of the plea proceeding evidences the voluntariness of his plea. In response to the trial court's inquiry, Daugherty stated that he was neither coerced nor compelled to plead guilty nor promised any leniency, gain, advantage, probation, or any other benefit to persuade him to plead guilty; that he fully understood the charges against him to which he pled guilty and the possibility of the imposition of the death penalty; and that he was also fully advised of all the rights he waived by pleading guilty. When asked during oral argument by this Court whether there was any question as to the voluntariness of Daugherty's pleas, Daugherty's counsel answered in the negative.

[1] Daugherty does challenge his death sentence. He contends that the court erred in allowing the State to present evidence of prior convictions as an aggravating circumstance where the offenses occurred subsequent to the capital felony for which he is now being sentenced and that the trial court erred in considering these prior convictions as an aggravating circumstance. He concedes, however, that we have resolved this argument against him in several recent decisions.

The State responds that not only have our decisions foreclosed this argument, but also Daugherty does not have standing to raise this point since one of the murders for which Daugherty was convicted was committed prior to the murder of Lavonne Sailer.

In *Elledge v. State*, 346 So.2d 998 (Fla. 1977), we rejected this same argument and held that it is clear from a reading of section 921.141(5)(b), Florida Statutes (1975), that the legislature referred to "previous convictions" and not to "previous crimes." Prior conviction, we emphasized, is the important element of this aggravating circumstance. *See also Lucas v. State*, 376 So.2d 1149 (Fla.1979). We likewise held in *King v. State*, 390 So.2d 315, 320 (Fla. 1980), *cert. denied*, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), that "[t]he legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." *See also Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

We hold that the trial court did not err in permitting the State to introduce these prior convictions and did not err in finding the aggravating circumstance that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

Daugherty also argues that the court erred in not considering certain mitigating factors. He initially contends that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. He asserts that the court erroneously premised its conclusion that this mitigating factor did not exist on the basis that Daugherty had been previ-

ously convicted of four murders. The court also noted that he had been convicted of three other robberies and two aggravated assaults. These crimes, states Daugherty, were committed after the Sailer murder. The State points out that one of these convictions was for a murder committed prior to the Sailer murder.

[2, 3] This prior conviction of the earlier committed capital felony is alone sufficient to negate the mitigating factor of no significant history of prior criminal activity. Moreover, in *Ruffin v. State*, we held that all of these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In *Ruffin*, we said that "prior" means prior to sentencing of a defendant and does not mean prior to the commission of the murder for which he is being sentenced. We explained:

> The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

397 So.2d at 288. Thus, we hold that the trial court properly rejected this mitigating factor. We further find no error in the court's rejecting the other statutory mitigating factors. Specifically as to other statutory mitigating factors, the trial court properly found:

> . . . .
>
> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> The Court finds the defendant was not under the influence of extreme mental or emotional disturbance. The defendant, Daugherty, at his trial claimed he did suffer from headaches but at the time he killed the victim in this case he was not suffering from any headaches so the court did not consider this a mitigating circumstance.
>
> (c) Whether the victims were participants in the defendant's conduct or consented to the acts.
>
> FINDING:
>
> The victim did not participate in the conduct or consent to the acts.
>
> (d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.
>
> FINDING:
>
> The defendant was the main participant in the murder and was the one who actually fired the shots into the victim.
>
> (e) Whether the defendant acted under extreme duress or under the substantial domination of another person.
>
> FINDING:
>
> The defendant claimed that he was influenced by his traveling companion, Bonnie Heath. The Court determines that while Bonnie Heath was a participant in many of the crimes she was a small woman in comparison to the defendant and the defendant was not under the extreme duress or domination of Bonnie Heath.
>
> (f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> FINDING:
>
> The defendant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

The evidence introduced at the sentencing hearing does not support a finding of any of these factors. Furthermore, the court did not err in rejecting the mitigating factor of age under the particular circumstances of

this case. At the time of this murder, Daugherty was 20 years old. As we said in *Peek v. State*, 395 So.2d 492, 498 (Fla.), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." We concluded in *Peek* that the trial court's rejection of age of 20 as a mitigating factor was supported by the record.

[4] Daugherty finally contends that the court erred in failing to find certain nonstatutory mitigating factors, *i.e.*, his alleged remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and the fact that at the time of sentencing, because of previous convictions, he would not be eligible for parole for 107½ years. Daugherty does not argue that the court failed to consider these circumstances or that it prevented him from introducing any relevant evidence of mitigation, nor would such an assertion be supported by the record. The court expressly stated that it considered and weighed all the testimony and evidence.

[5] We find no merit to this contention. The trial court considered all the evidence and decided that the death sentence was warranted since there were sufficient aggravating circumstances and insufficient mitigating circumstances. His conclusions are supported by the record. As we have previously stated, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. *Riley v. State*, 413 So.2d 1173 (Fla. 1982); *Smith v. State*, 407 So.2d 894 (Fla. 1981); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979).

Accordingly, finding no error, we affirm.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

DEPARTMENT OF TRANSPORTATION, State of Florida, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

HILLSBOROUGH COUNTY, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

CITY OF TAMPA, etc., Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

Nos. 61029, 61042 and 61053.

Supreme Court of Florida.

Sept. 14, 1982.

Action was brought against truck owner, Department of Transportation, Hillsborough County and City of Tampa to recover for personal injuries which plaintiffs sustained in intersectional motor vehicle collision. The Circuit Court, Hillsborough County, O. D. Howell, Jr., J., dismissed the governmental entities. The District Court of Appeal, 376 So.2d 296, reversed and remanded. On remand, the trial court again dismissed the governmental entities, and plaintiffs appealed. The District Court of Appeal, 400 So.2d 799, reversed and remanded. Applications for review were granted. The Supreme Court, Overton, J., held that: (1) failure to install traffic control devices and failure to upgrade an existing road or intersection, as well as decision to build a road or roads with a particular alignment, are judgmental, planning-level functions and absolute immunity attaches; (2) failure to comply with statutory standards and criteria for design, construction and maintenance subjects governmental en-

AUTHORITIES INVOLVED

The Constitution of the United States of America, amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Constitution of the United States of America, amendment XIV, section 1:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Fla Stat. Ann. § 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

> (1) Separate proceedings on issue of penalty. -- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exlusionary

rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the Jury. - After hearing all the evidence, he jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.

(4) Review of judgment and sentence. - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days

after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances. - Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

82-5879

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5879

JEFFREY JOSEPH DAUGHERTY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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I. CITATION TO OPINION BELOW

The opinion Petitioner seeks to have this Court review is reported in Daugherty v. State, 419 So.2d 1067 (Fla. 1982) and is attached as Respondent's Appendix #1.

II. JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Eighth and Fourteenth Amendments to the United States Constitution and Section 921.141 Florida Statutes are involved.

IV. STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the case to the extent that it is unsupported by the record. While much of the procedural history of this case recounted by Petitioner would seem accurate, Respondent would take strong exception to the conclusory allegation that during the penalty hearing, Petitioner introduced "evidence" to demonstrate that he was not a violent or dangerous person and that his crimes were triggered by emotionally disabling circumstances. The Respondent would note that such recitation of the "evidence" contains no citation to the record at this juncture. There is no evidence that Petitioner was experiencing these headaches on the day that the hitchhiker/victim was killed. (TT, 72-73).

Petitioner further alleges that testimony concerning his conviction in Pennsylvania for murder of a gas station attendant was allowed even though that conviction was reversed on appeal. The Respondent would take strong exception to this statement. At the time of the sentencing hearing, that Pennsylvania conviction had not been reversed on appeal. The dates of the sentencing hearing were November 18-20, 1980. The Pennsylvania conviction was reversed on March 13, 1981. (See Appendix #2, Commonwealth v. Daugherty, 426 A.2d 104 (Pa. 1981).

V. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW.

Petitioner maintains that he requested the transmittal of the entire transcript of the bifurcated penalty or sentencing phase, yet the voir dire, sentencing instructions to the jury, and sentencing arguments of counsel were left out.

Respondent would simply point out that counsel for Petitioner below designated to the court reporter to file "the following as only so much of the proceedings as fairly supports the issues raised: the transcription of all court proceedings occurring in the bifurcated penalty or sentencing phase of the above-styled case." (R-295) Of necessity, this raises the question of what are the issues to be raised on appeal. In Petitioner's Statement of Judicial Acts to be Reviewed, Petitioner does not assert any issues concerning voir dire, sentencing instructions to the jury, or arguments of counsel. (R,269-297). Therefore, the court reporter omitted the transmittal of those sections of the transcript.

Petitioner never moved to supplement the record with these missing portions of the transcript as provided by Rule 9.200(f), Florida Rules of Appellate Procedure. This issue was never raised by Petitioner in his direct appeal; and was only raised subsequent to the decision in his case, by his very general Motion for Rehearing or Clarification. Additionally, the invalidity of Petitioner's Pennsylvania conviction was not asserted in his direct appeal, but only raised in Petitioner's Motion for Rehearing and Clarification.

The issues before the Florida Supreme Court were (1) whether the trial court erred in allowing the State to present evidence of prior convictions and of the facts and circumstances relating thereto as aggravating circumstances where all but one of the offenses occurred subsequent to the capital felony for which the defendant was being prosecuted and (2) whether the sentence of death imposed upon Appellant was unjustified in that it was based upon inappropriate aggravating circumstances; mitigating circumstances should have been found;

and the mitigating circumstances outweighed the aggravating circumstances. (See Brief of Petitioner/Appellant and Respondent/Appellee attached hereto respectively as Appendices #3 and 4).

Respondent would maintain that the issue asserted in Ground I of the Petition alleging that the Court below reviewed an incomplete record is not properly before this Court. This issue was raised "unseasonably late," for the first time, in Petitioner's Motion for Rehearing and Clarification. Hanson v. Denckla, 78 S.Ct. 1228, 357 U.S. 235, 2 L.Ed.2d 1283, reh.den. 79 S.Ct. 10, 358 U.S. 858, 3 L.Ed.2d 92 (1958).

Respondent would further assert that Ground II, whether a death sentence can be based on an invalid prior conviction was never raised on direct appeal by Petitioner. At the time of the penalty phase/sentencing hearing, Petitioner's Pennsylvania conviction had not been reversed. At the sentencing hearing, counsel for Petitioner never objected to the introduction of this conviction. (TT-153). Such failure to comply with Florida's contemporaneous objection rule has been viewed by Florida Appellate Courts as barring review. Castor v. State, 365 So.2d 701 (Fla. 1978).

In Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S. Ct. 1161 (1969), this Court noted that it was well established that it would not decide federal constitutional issues raised here for the first time on review of State court decisions. Similarly in Street v. New York, 394 U.S. 576, 582 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969), this Court declared that when the highest court of the state has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show otherwise. See also, Fuller v. Oregon, 417 U.S. 40, 94 S.Ct. 2116 (1974); Walters v. City of St.Louis, 347 U.S. 231, 74 S.Ct. 505 (1954); and Stembridge v. Georgia, 343 U.S. 541, 547, 72 S.Ct. 834 (1952), and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981).

REASONS FOR NOT GRANTING THE WRIT

I. WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCE CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends that he was deprived of meaningful appellate review of his death sentence and that the Florida Supreme Court affirmed his sentence on the basis of an incomplete record from which were missing: (1) the pre-sentence investigation report; (2) the sentencing instructions to the jury; (3) the sentencing arguments of counsel; (4) the jury voir dire, and (5) a transcript of a forty (40) minute taped statement by Daugherty that was played at the sentencing hearing. Additionally, Petitioner maintains that the court did not conduct an independent review of the sentencing record to determine if death was justified by the evidence of aggravation and mitigation.

A. WHETHER PETITIONER WAS ENTITLED TO AN ENTIRE TRANSCRIPTION OF THE SENTENCING HEARING.

Petitioner contends that his sentence was affirmed on the basis of an incomplete record on appeal. In this allegation, Petitioner fails to point out that in the designations to the court reporter, counsel for Petitioner below requested that the court reporter file "the following as only so much of the proceedings as fairly supports the issues raised: the transcription of all court proceedings occurring in the bifurcated penalty or sentencing phase of the above-styled case." (R 295). Of necessity, this requires the court reporter to know what the issues are. In the case of a state funded appeal, the appellant must file a Statement of Judicial Acts to be Reviewed. Under Florida law, an indigent defendant is entitled at state expense to only those portions of the transcript which relate to the assignments of error filed with the trial court. Cueni v. State, 303 So.2d 411 (Fla. 1st DCA 1974), cert. den. 310 So.2d 738 (Fla. 1975), cert. den. 423 U.S. 837, 96 S.Ct. 64, 46 L.Ed.

2d 56 (1975). See also, In re Rule 9.140, 376 So.2d 844 (Fla. 1979). In the instant case, Petitioner's Statement of Judicial Acts to be Reviewed, Petitioner does not assert any issues concerning voir dire, sentencing instructions to the jury, or arguments of counsel (R, 296-297).

Furthermore, Petitioner never moved to supplement the record with these missing portions of the transcript as provided by Rule 9.200(f), Florida Rules of Appellate Procedure. This issue was never raised in Petitioner's direct appeal, and only presented "unseasonably late" in a motion for rehearing and clarification. Therefore, review by this court is precluded. Stembridge v. Georgia, supra; Walters v. City of St. Louis, supra; Street v. New York, supra; and Webb v. Webb, supra.

Notwithstanding the above cited cases, it is settled that "while it is clear that an indigent is entitled to a free transcript on appeal, See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed.891 (1956), the state is not obligated to automatically supply a complete verbatim transcript." In Draper v. Washington, 372 U.S. 487, 495-496, 83 S.Ct. 774, 779, 9 L.Ed. 2d 899 (1963), the Supreme Court stated:

> [P]art or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances. If, for instance, the points urged related only to the validity of the statute or the sufficiency of the indictment upon which conviction was predicated, the transcript is irrelevant and need not be provided. If the assignments of error go only to rulings on evidence or to its sufficiency, the transcript provided might well be limited to the portions relevant to such issues. Even as to this kind of issue, however, it is unnecessary to afford a record of the proceedings pertaining to an alleged failure of proof on a point which is irrelevant as a matter of law to the elements of the crime for which the defendant has been convicted. In the examples given, the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the

State must waste its funds by providing what is unnecessary for adequate appellate review (footnote omitted).

See also Mayer v. Chicago, 404 U.S. 189, 194-95, 92 S.Ct. 410, 414-15, 30 L.Ed.2d 372 (1971).

In Moore v. Wainwright, 633 F. 2d 406, 408 (5th Cir. 1981) the court held Florida's procedure, which limits a defendant's right to a free transcript to only those portions pertinent to the assignments of error, [now referred to as Statement of Judicial Acts to be Reviewed] is not in itself unconstitutional.

B. WHETHER THE RECORD ON APPEAL WAS MISSING CRITICAL PORTIONS.

Respondent would incorporate its response in Part A herein, and would maintain that the record on appeal was not missing critical portions.

(1) The Presentence Report. The Florida Supreme Court in recognition of its responsibility under Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197 (1977), entered an order on December 4, 1981, directing that the presentence investigation be transmitted to the court. (See Appendix #5).

(2) Jury voir dire. Unlike in Delap v. State, 350 So.2d 462 (Fla. 1977), the Petitioner has not asserted that the jury voir dire is unavailable. The jury voir dire in the case sub judice is available. Unlike in Delap, no motion to supplement the record with the missing portions was ever filed. Therefore Delap is inapplicable.

(3) The sentencing arguments by counsel. The fact that the trial judge referred to the arguments of counsel, in passing, in the order of judgment and sentence, briefly, does not, contrary to Petitioner's assertion; indicate that the trial judge expressly relied on the arguments of counsel, so much as to render the arguments, a critical portion of the hearing. Again, unlike in Delap, there is no allegation that the arguments of counsel were unavailable. Additionally, there was no motion to supplement the record, as there was in Delap.

(4) Jury Instructions. As set out in Part A above, Respondent would reemphasize that the preceeding three sub issues were never presented to the court below, as did the Petitioners/defendants in Godfrey v. Georgia, 446 U.S. 420 (1980); and Henry v. Wainwright, 661 F.2d 56 (5th Cir.), vacated and remanded on other grounds, 102 S.Ct. 2922, reinstated following remand, 686 F.2d 311 (5th Cir. 1982).

(5) The transcript of the forty (40) minute taped statement by Daugherty. This transcript was not part of the record before the trial court. It was never introduced into evidence, and was used by a witness, Wayne Porter (an investigator for the State's Attorney) to follow along as the tape of the statement was played to the jury. There was no objection to the tape being introduced into evidence without the transcript. (TT, 93-94).

C. WHETHER THE FLORIDA SUPREME COURT PROPERLY WEIGHED AND EVALUATED THOSE PORTIONS OF THE RECORD WHICH WERE BEFORE IT.

Petitioner maintains that the Florida Supreme Court failed to conduct an independent review, or to reweigh the evidence of the aggravating and mitigating circumstances to determine whether the imposition of the death penalty is warranted. The Petitioner contends that he is constitutionally entitled to more than the conventional review given by appellate courts in non-capital cases. Petitioner further alleges that the Florida Supreme Court left wholly to the trial court the task of weighing the evidence. Petitioner maintains that this is evidenced by this statement in the opinion; "it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it." Daugherty v. State, 419 So.2d at 1071.

Petitioner has overlooked the preceding discussion by the Florida Supreme Court in reviewing the issue that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. In the Court below, Daugherty asserted that the trial court erred

in concluding that this mitigating factor did not exist on the basis that Daugherty had previously been convicted of four (4) murders. Id. 419 So.2d at 1069-1070. The Supreme Court pointed out that the trial court noted that Daugherty had been convicted of three (3) other robberies and two (2) aggravated assaults. Daugherty argued below that these crimes were committed after the Sailer murder (the victim in the instant case). The State of Florida pointed out that one of these convictions was for a murder committed prior to the Sailer murder. Id. 419 So.2d at 1070. This conviction involved the murder of Carmen Abrams, a white female in her sixties; which occurred in Flagler County, Florida on February 23, 1976. (TT, 111-112); Id. 419 So.2d at 1068. Evidence of this conviction was introduced without objection. (TT-111).

The Florida Supreme Court held that "This prior conviction of the earlier committed felony is alone sufficient to negate the mitigating factor of no significant history of prior criminal activity." Id. 419 So.2d at 1070. Then the court reviewed the instant case in light of Ruffin v. State, 397 So.2d 277 (Fla. 1981), wherein the court held that all of these prior convictions could be properly considered on the basis for rejecting this mitigating factor. The court went on to state that, "In Ruffin, we said that "prior" means prior to sentencing of a defendant and does not mean prior to the commission of the murder for which he is being sentenced." Daugherty, supra at 419 So.2d 1070.

The court below examined all of the other statutory mitigating circumstances and the evidence introduced at sentencing and found that there was no support for a finding of any of those factors. Id. 419 So.2d 1070.

Petitioner now alleges that this review of his death sentence was something less than he was entitled to. This Court noted in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976) that Section 921.141 Florida Statutes does not require the Court to conduct any specific form of review. Florida's death penalty statute, Section 921.141, Florida Statutes (1979), directs that a jury and judge, not the Florida Supreme Court,

must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. The jury performs that function only to recommend a sentence to the trial judge. It then becomes the responsibility of the trial judge to weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose. See Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, 102 S.Ct. 542 (1981).

In Brown v. Wainwright, the court below explained:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying Section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed in that case a nonstatutory aggravating circumstance was considered. See also Brown v. State, 381 So.2d 690 (Fla.1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979).
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. Proffitt v. State, 428 U.S. 242, 96 S.Ct. 2960, 49 L. Ed. 2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed. 2d 295 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See Malloy v. State, 382 So.2d 1190 (Fla. 1979); Burch v. State, 343 So.2d 831 (Fla. 1977); Jones v. State, 332 So.2d 615 (Fla. 1976).
>
> Neither of our sentence review functions,it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating

> circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.
>
> It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). Accord, Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). (footnote omitted).

This same issue was raised in a Petition for Writ of Certiorari to the Florida Supreme Court in the recent case of Quince v. Florida, 414 So.2d 185, 187 (Fla. 1982), cert.denied, Quince v. Florida, Case No. 82-5096 (U.S. Sup.Ct. decided October 4, 1982). (Appendix #6). This court denied the Petition in Quince v. Florida, on this issue, and should therefore deny the instant petition; especially in light of the fact that this issue was never raised in the court below.

The Florida Supreme Court, in the instant case, has not deviated from the requirements of Proffitt v. Florida, supra; but has in fact fully complied with its requirements. Therefore, the court's affirmance of Petitioner's death sentence, does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE CAN BE BASED ON INVALID PRIOR CONVICTIONS.

At the outset, as heretofore expressed, (See Part V How the Federal Questions Were Raised and Decided Below),

this issue was never presented to the court below on direct appeal; and only generally, in a Motion for Rehearing and Clarification. Therefore, review by this Court is precluded. Webb v. Webb, supra; Stembridge v. Georgia, supra.

Notwithstanding the fact that this matter is not subject to review by this Court, Respondent would point out that at the time of the bifurcated penalty/sentencing hearing, the Petitioner's Pennsylvania conviction had not been reversed. Therefore, any consideration of that conviction by the judge and jury was not improper. (See Appendix #2).

Additionally, the Florida Supreme Court pointed out in the opinion below that the earlier prior conviction for a capital felony alone was sufficient to negate the mitigating factor of no significant history of prior criminal activity. Daugherty v. State, 419 So.2d at 1070.

Petitioner's reliance upon United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed. 2d 592 (1972) is misplaced. Tucker involved the use of prior convictions that were obtained in violation of his Sixth Amendment right to counsel, and which were invalid under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

The instant case, unlike Tucker, does not involve any such constitutionally infirm convictions. Unlike in Tucker Petitioner's Pennsylvania conviction that was reversed, occurred due to adverse pretrial publicity; not due to the deprivation of the Sixth Amendment right to counsel. Additionally, unlike in Tucker, Petitioner's convictions were voluminous in comparison to Tucker's three (3) convictions. Respondent would point out that only one of the Pennsylvania murder cases was reversed. Additionally, Petitioner had several other prior valid convictions for murder in Flagler and Volusia County, Florida to support the imposition of the death penalty.

Petitioner has no citations to the record that substantiates his claim that the trial court specifically relied more upon this one conviction for murder that was reversed; than it did upon the other "three" valid convictions for

murder (Elizabeth Shank in Pennsylvania; Carmen Abrams, Flagler County, Florida; and Betty Campbell, Volusia County, Florida). There can be no speculation that "one" murder conviction "tainted" the sentencing proceedings below. The sheer volume of crimes committed by Petitioner in the "crime spree" detailed in the opinion below, defy any speculation that "one" particular conviction was specifically relied upon by the sentencing judge. Such a claim is clearly untenable in light of the length of Petitioner's criminal record. Tucker is clearly inapplicable to the present case.

Unlike in Zant v. Stephens, 102 S.Ct. 1855 (1982) where the Georgia Supreme Court had set aside as invalid, one of the enumerated statutory aggravating factors found by the jury; the Florida Supreme Court has not set aside any of the enumerated statutory aggravating factors found in §921.141 Florida Statutes. Therefore, Zant is inapplicable.

Additionally, in State v. Dixon, 283 So.2d 1,9 (Fla. 1973) the Florida Supreme Court upheld the constitutionality of the statute, and stated that: "when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in §921.141, Florida Statutes."

In the present case, the trial judge cited seven (7) convictions to sustain the finding of the statutory aggravating factor that the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person (R,311-312); only one of which was invalid. The trial judge found that there was insufficient mitigating circumstances to override the two (2) enumerated statutory aggravating circumstances. (R-314).

Contrary to Petitioner's assertion, the record and the opinion of the court below, amply justifies the imposition of the death penalty herein. The process by which the death penalty was imposed is clearly subject to meaningful review as noted by this court in Proffitt v. Florida, supra.

Petitioner further relies on Barclay v. Florida, No. 81-6908, cert. granted (Nov. 8, 1982) which is likewise inapplicable to the present case. The issue in Barclay involved the question of whether the use by the trial judge of a non-enumerated statutory aggravating factor, where there were no mitigating circumstances, constitutes a denial of due process.

Respondent would point out that Petitioner relies heavily on cases that were reversed and remanded for resentencing due to the fact that the defendants were convicted without legal counsel, in violation of their right to counsel under Gideon v. Wainwright, supra. In the present case, the significant factor rendering one of Petitioner's seven (7) prior convictions invalid, did not encompass an uncounseled conviction, as in those cases relied upon by Petitioner. See United States v. Tucker, supra; Jenrette v. Wainwright, 410 So.2d 575, 578 (Fla. 3d DCA 1982); Wilcox v. State, 269 So.2d 420 (Fla. 2d DCA 1972); Wolfe v. State, 323 So.2d 680 (Fla. 2d DCA 1975), and Hicks v. State, 336 So.2d 1245 (Fla. 3d DCA 1976).

In Wolfe v. State, the court pointed out that this decision should not be construed as requiring resentencing in every case where reference is made in a pre-sentence report to a conviction which is later alleged to have been invalid on Gideon grounds. In sentencing Wolfe and Tucker, the trial judges were specifically directed to their uncounseled convictions, which in Wolfe, was a similiar crime to the case before the court.

There is nothing in the record to indicate that the one invalid Pennsylvania conviction was more influential than the other six (6) convictions. Daugherty's invalid prior conviction was not uncounseled. The trial judge found six (6) other valid convictions to sustain one of the two (2) aggravating factors found herein. When there is one or more statutory aggravating factors and no significant mitigating circumstances, the imposition of the death sentence is mandatory. State v. Dixon, 283 So.2d at 9.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER A STATUTORY SCHEME WHICH ESTABLISHES PRIOR CONVICTIONS AS AN AGGRAVATING CIRCUMSTANCE CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS.

In this Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), this Court found §921.141 Florida Statutes, and all of the provisions therein to be in harmony with the dictates of the United States Constitution.

Section 921.141(1) Florida Statutes (1979), provides that in the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating and mitigating circumstances in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence provided the defendant is accorded a fair opportunity to rebut any hearsay statement.

Petitioner does not assert that he did not have an opportunity to rebut any of the testimony relevant to the details of the crimes for which he was convicted. Respondent would point out that there was no objection to the introduction of the factual details of his prior convictions.

In Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), the Florida Supreme Court found it appropriate to permit testimony concerning the events which resulted in the prior convictions, as opposed to restricting the evidence to the bare admission of the conviction. The court in Elledge went on to state that, "This is so because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge." 346 So.2d at 1002; accord, McCrae v. State, 395 So.2d 1145, 1154 (Fla. 1981) cert.

denied, 102 S.Ct. 583, 70 L. Ed. 2d 486 (1981), Ruffin v. State, 397 So.2d 277, 283 (Fla. 1981), cert. denied, 102 S.Ct. 368 (1981); and King v. State, 390 So.2d 315, 321 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed. 2d 825 (1981).

The use of the evidence surrounding Daugherty's prior convictions was necessary for the trial judge to determine whether Petitioner should be imprisoned for life or sentenced to death. The statutory aggravating circumstance at issue herein, is a specific guideline that the Florida Legislature has given trial judges to assist them in their decision making. This guideline is designed to ensure that persons with a similar propensity to commit violent crimes, as Petitioner did, would receive a similar sentence. This is a valid measure to seek to assure that the death penalty in Florida, is not imposed in any arbitrary or capricious manner. Proffitt v. Florida, supra.

CONCLUSION

Based upon the above and foregoing arguments and citations of authority, Respondent respectfully requests that this court deny the petition for writ of certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EVELYN D. GOLDEN, Counsel for the State of Florida, the Respondent, hereby certify that on January 13th, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Brief in Opposition to Petitioner's Petition for Writ of Certiorari with attached appendix on Jeffery Joseph Daugherty to James E. Daniels, Esquire, Donovan, Leisure, Newton, and Irvine, 30 Rockefeller Plaza, New York, New York 10112.

Evelyn D. Golden
COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5879

JEFFREY JOSEPH DAUGHERTY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S APPENDIX

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COUNSEL FOR RESPONDENT

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should begin to run. *Casto* was decided after the district court's decision in *Graburnick*.

We quash the decision of the district court dismissing the appeal as untimely and remand the cause for further consideration in accordance with the views expressed in *Casto* and this opinion.

It is so ordered.

BOYD, OVERTON and SUNDBERG, JJ., concur.

McDONALD, J., dissents with an opinion, with which ALDERMAN, C. J., concurs.

McDONALD, Justice, dissenting.

I dissent. We made a mistake in *Casto v. Casto*, 404 So.2d 1046 (Fla.1981), and this case gives us a vehicle to correct that error. The time for filing a petition for rehearing should commence to run when the judgment sought to be reheard is filed with the clerk of the court. The Third District Court of Appeal correctly dealt with this issue in *Dibble v. Dibble*, 377 So.2d 1001 (Fla.3d DCA 1979). We should adopt that opinion and dispose of this case accordingly.

ALDERMAN, C. J., concurs.

Jeffrey Joseph DAUGHERTY, Petitioner,

v.

STATE of Florida, Respondent.

No. 60709.

Supreme Court of Florida.

Sept. 14, 1982.

Defendant was convicted in the Circuit Court, Brevard County, J. William Woolson, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) it was not error to permit State to introduce, in death penalty sentencing phase of capital murder prosecution, defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced; (2) evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity; and (3) record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

Affirmed.

1. Homicide ⇨354

It was not error to permit State to introduce in death penalty sentencing phase of capital murder prosecution defendant's prior conviction, and it was not error to find aggravating circumstance that defendant was previously convicted of another capital felony or felony involving use or threat of violence to person, even though offenses occurred subsequent to capital felony for which defendant was sentenced. West's F.S.A. § 921.141(5)(b).

2. Criminal Law ⇨986.2(4)

Evidence as to prior capital felony was sufficient to support rejection of statutory mitigating factor of no significant history of prior criminal activity.

3. Homicide ⇨354

In sentencing phase of capital murder prosecution, record established that no error occurred in rejection of statutory mitigating factors of acting under influence of extreme mental or emotional disturbance, participation in or consent to defendant's conduct by victims, degree of defendant's

Exhibit 1

participation in murder, duress, and lack of capacity to appreciate criminality of conduct.

4. Homicide ⇐354

In sentencing phase of capital murder prosecution, it was not error to fail to find nonstatutory mitigating factors of defendant's claimed remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and defendant's ineligibility for parole for 107½ years.

5. Criminal Law ⇐1208(1)

It is within province of trial court to decide whether particular mitigating circumstance in sentencing has been proven and weight to be given it in determining whether to impose death penalty.

Arthur J. Kutsche, of the Law Offices of A. J. "Sonny" Kutsche, Titusville, for petitioner.

Jim Smith, Atty. Gen., and C. Michael Barnette, Asst. Atty. Gen., Daytona Beach, for respondent.

PER CURIAM.

Jeffrey Joseph Daugherty appeals his conviction and sentence of death for the first-degree murder of Lavonne Patricia Sailer. We affirm.

Daugherty, along with his girl friend Bonnie Heath and his uncle, left Michigan in January 1976 and traveled to Florida purportedly to look for jobs and to visit Heath's children. On February 23, 1976, he robbed an Easy Way food store and shot and killed Carmen Abrams and seriously wounded her husband. Continuing on a killing and robbing spree, on March 1, 1976, Daugherty and Heath picked up Lavonne Sailer who was hitchhiking in Melbourne, Florida. They took her to an isolated area near the Brevard County dump where Daugherty told her to get out of the car and robbed her. He then shot her five times at close range with a .22 caliber pistol. They then returned to the nearby bar to pick up Daugherty's uncle. Thereafter for a twenty-day period, Daugherty, along with Heath, continued on a course of robberies and murders, several of which he was convicted and for which he was sentenced prior to being convicted and sentenced for the Sailer murder.

Daugherty pled guilty to the first-degree murder, robbery, and kidnapping of Sailer. A jury was then impaneled for the sentencing phase. The jury recommended a sentence of death, and the judge imposed the death sentence for the first-degree murder and life sentences for the robbery and kidnapping. The trial court found as an aggravating factor that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person. It enumerated the previous convictions as follows:

(1) The defendant was convicted and sentenced on July 31, 1980, for First Degree Murder in Flagler County, Fl. where he shot and killed a white female in her sixties by shooting her in her left shoulder and right temple during the course of robbing the victim.

(2) The defendant was sentenced on July 14, 1980, for the Murder of a white female by the name of Campbell whom he stabbed after he had robbed her place of business in Volusia County, Fl.

(3) The defendant was convicted and sentenced on September 29, 1978, for Criminal Homicide, Criminal Conspiracy, Robbery and crimes committed with firearms. The defendant robbed a gas station and in the process shot the young attendant twice in the side, once in the bridge of the nose and once under the chin.

(4) The defendant was convicted and sentenced on January 4, 1980, for Robbery, Aggravated Assault, Simple Assault and crimes committed with firearms. In Altoona, Pa. the defendant robbed a woman clerk at Rich's Music Store with a firearm and in the process assaulted the woman a number of times until she lost consciousness.

(5) The defendant was convicted and sentenced on September 29, 1978, in the State of Pennsylvania for the crimes of Simple Assault, Aggravated Assault, Burglary, Robbery and crimes committed with firearms.

(6) The defendant was convicted and sentenced on July 12, 1976, in the State of Virginia for Armed Robbery and using a firearm while committing a felony.

(7) The defendant was convicted and sentenced on January 4, 1980, for Criminal Conspiracy, Robbery and Criminal Homicide. The defendant robbed one Betty Shank at a Jack's Kwik-Mart in Blair County, Pa. and in the process killed the clerk by shooting her in the body and head.

The trial court also found as an aggravating circumstance that the murder was committed for pecuniary gain. Weighing the aggravating and mitigating circumstances, it concluded the death sentence is justified because there are sufficient aggravating circumstances and insufficient mitigating circumstances.

Daugherty does not challenge his plea of guilty to the charges against him. The transcript of the plea proceeding evidences the voluntariness of his plea. In response to the trial court's inquiry, Daugherty stated that he was neither coerced nor compelled to plead guilty nor promised any leniency, gain, advantage, probation, or any other benefit to persuade him to plead guilty; that he fully understood the charges against him to which he pled guilty and the possibility of the imposition of the death penalty; and that he was also fully advised of all the rights he waived by pleading guilty. When asked during oral argument by this Court whether there was any question as to the voluntariness of Daugherty's pleas, Daugherty's counsel answered in the negative.

[1] Daugherty does challenge his death sentence. He contends that the court erred in allowing the State to present evidence of prior convictions as an aggravating circumstance where the offenses occurred subsequent to the capital felony for which he is now being sentenced and that the trial court erred in considering these prior convictions as an aggravating circumstance. He concedes, however, that we have resolved this argument against him in several recent decisions.

The State responds that not only have our decisions foreclosed this argument, but also Daugherty does not have standing to raise this point since one of the murders for which Daugherty was convicted was committed prior to the murder of Lavonne Sailer.

In *Elledge v. State*, 346 So.2d 998 (Fla. 1977), we rejected this same argument and held that it is clear from a reading of section 921.141(5)(b), Florida Statutes (1975), that the legislature referred to "previous convictions" and not to "previous crimes." Prior conviction, we emphasized, is the important element of this aggravating circumstance. *See also Lucas v. State*, 376 So.2d 1149 (Fla.1979). We likewise held in *King v. State*, 390 So.2d 315, 320 (Fla. 1980), *cert. denied*, 450 U.S. 969, 101 S.Ct. 1529, 67 L.Ed.2d 825 (1981), that "[t]he legislative intent is clear that any violent crime for which there was a conviction at the time of sentencing should be considered as an aggravating circumstance." *See also Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981).

We hold that the trial court did not err in permitting the State to introduce these prior convictions and did not err in finding the aggravating circumstance that Daugherty was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

Daugherty also argues that the court erred in not considering certain mitigating factors. He initially contends that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. He asserts that the court erroneously premised its conclusion that this mitigating factor did not exist on the basis that Daugherty had been previ-

ously convicted of four murders. The court also noted that he had been convicted of three other robberies and two aggravated assaults. These crimes, states Daugherty, were committed after the Sailer murder. The State points out that one of these convictions was for a murder committed prior to the Sailer murder.

[2, 3] This prior conviction of the earlier committed capital felony is alone sufficient to negate the mitigating factor of no significant history of prior criminal activity. Moreover, in *Ruffin v. State*, we held that all of these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In *Ruffin*, we said that "prior" means prior to sentencing of a defendant and does not mean prior to the commission of the murder for which he is being sentenced. We explained:

> The interpretation of "prior" advanced by Ruffin is unreasonable particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of those years he may have a long history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance.

397 So.2d at 283. Thus, we hold that the trial court properly rejected this mitigating factor. We further find no error in the court's rejecting the other statutory mitigating factors. Specifically as to other statutory mitigating factors, the trial court properly found:

> ....
>
> (b) Whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> FINDING:
>
> The Court finds the defendant was not under the influence of extreme mental or emotional disturbance. The defendant, Daugherty, at his trial claimed he did suffer from headaches but at the time he killed the victim in this case he was not suffering from any headaches so the court did not consider this a mitigating circumstance.
>
> (c) Whether the victims were participants in the defendant's conduct or consented to the acts.
>
> FINDING:
>
> The victim did not participate in the conduct or consent to the acts.
>
> (d) Whether the defendant was an accomplice in the murder committed by another person, and the defendant's participation was relatively minor.
>
> FINDING:
>
> The defendant was the main participant in the murder and was the one who actually fired the shots into the victim.
>
> (e) Whether the defendant acted under extreme duress or under the substantial domination of another person.
>
> FINDING:
>
> The defendant claimed that he was influenced by his traveling companion, Bonnie Heath. The Court determines that while Bonnie Heath was a participant in many of the crimes she was a small woman in comparison to the defendant and the defendant was not under the extreme duress or domination of Bonnie Heath.
>
> (f) Whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired.
>
> FINDING:
>
> The defendant had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

The evidence introduced at the sentencing hearing does not support a finding of any of these factors. Furthermore, the court did not err in rejecting the mitigating factor of age under the particular circumstances of

this case. At the time of this murder, Daugherty was 20 years old. As we said in *Peek v. State*, 395 So.2d 492, 498 (Fla.), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), "There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." We concluded in *Peek* that the trial court's rejection of age of 20 as a mitigating factor was supported by the record.

[4] Daugherty finally contends that the court erred in failing to find certain nonstatutory mitigating factors, *i.e.*, his alleged remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and the fact that at the time of sentencing, because of previous convictions, he would not be eligible for parole for 107½ years. Daugherty does not argue that the court failed to consider these circumstances or that it prevented him from introducing any relevant evidence of mitigation, nor would such an assertion be supported by the record. The court expressly stated that it considered and weighed all the testimony and evidence.

[5] We find no merit to this contention. The trial court considered all the evidence and decided that the death sentence was warranted since there were sufficient aggravating circumstances and insufficient mitigating circumstances. His conclusions are supported by the record. As we have previously stated, it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it. *Riley v. State*, 413 So.2d 1173 (Fla. 1982); *Smith v. State*, 407 So.2d 894 (Fla. 1981); *Lucas v. State*, 376 So.2d 1149 (Fla. 1979).

Accordingly, finding no error, we affirm.

It is so ordered.

ALDERMAN, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, McDONALD and EHRLICH, JJ., concur.

DEPARTMENT OF TRANSPORTATION, State of Florida, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

HILLSBOROUGH COUNTY, Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

CITY OF TAMPA, etc., Petitioner,

v.

William M. NEILSON, etc., et al., Respondents.

Nos. 61029, 61042 and 61053.

Supreme Court of Florida.

Sept. 14, 1982.

Action was brought against truck owner, Department of Transportation, Hillsborough County and City of Tampa to recover for personal injuries which plaintiffs sustained in intersectional motor vehicle collision. The Circuit Court, Hillsborough County, O. D. Howell, Jr., J., dismissed the governmental entities. The District Court of Appeal, 376 So.2d 296, reversed and remanded. On remand, the trial court again dismissed the governmental entities, and plaintiffs appealed. The District Court of Appeal, 400 So.2d 799, reversed and remanded. Applications for review were granted. The Supreme Court, Overton, J., held that: (1) failure to install traffic control devices and failure to upgrade an existing road or intersection, as well as decision to build a road or roads with a particular alignment, are judgmental, planning-level functions and absolute immunity attaches; (2) failure to comply with statutory standards and criteria for design, construction and maintenance subjects governmental en-

pension Order, but also his long history of unprofessional and unethical conduct.[5] Unfortunately, respondent even yet does not appear to recognize the standards under which every attorney must practice.[6]

Accordingly, respondent is disbarred and prohibited from the practice of law in the Commonwealth of Pennsylvania.

ORDER

AND NOW, this 9th day of March, 1981, it is ORDERED, as follows:

1. That Fredrick R. Herman, is disbarred from the practice of law.

2. That Fredrick R. Herman, shall comply with the provisions of Rule 217 of the Rules of Disciplinary Enforcement of the Supreme Court of Pennsylvania pertaining to disbarred attorneys.

COMMONWEALTH of Pennsylvania

v.

Jeffrey Joseph DAUGHERTY, Appellant.

Supreme Court of Pennsylvania.

Argued Oct. 3, 1980.

Decided March 13, 1981.

Defendant was convicted before the Court of Common Pleas, Criminal, Blair County, at C.A. Nos. 892 and 1011 of 1976, John A. Cherry, J., of murder of the first degree, criminal conspiracy, and other lesser offenses, and was sentenced to life imprisonment, and he appealed. The Supreme Court, No. 80-1-28, O'Brien, C.J., held that since extensive publicity preceding defendant's trial contained information relating to his prior unrelated criminal conduct, and continued to a point proximate to trial, it was abuse of discretion to deny motion for change of venue, notwithstanding fact that publicity was factual and objective.

Reversed and remanded.

1. Criminal Law ⇐121

Grant or denial of change of venue is matter within sound discretion of trial court.

2. Criminal Law ⇐1150

Trial court's ruling on motion for change of venue will be reversed only where there is abuse of discretion.

3. Criminal Law ⇐126(1)

Where pretrial publicity is so pervasive and inflammatory as to be inherently prejudicial, normal requirement for change of venue that defendant demonstrate actual juror prejudice is obviated.

4. Criminal Law ⇐126(1)

Where extensive publicity preceding defendant's trial contained information relating to his prior unrelated criminal conduct and continued to a point proximate to trial, it was abuse of discretion to deny motion to change venue notwithstanding fact that such publicity was factual and objective.

Norman D. Callan, Asst. Public Defender, John Woodcock, Jr., Public Defender, Hollidaysburg, for appellant.

Thomas G. Peoples, Jr., Dist. Atty., Hollidaysburg, James V. McCullough, Altoona, for appellee.

Before O'BRIEN, C. J., and ROBERTS, NIX, LARSEN, FLAHERTY and KAUFFMAN, JJ.

[5] See note 1, supra.

[6] *Office of Disciplinary Counsel v. Grigsby*, Pa. —, 425 A.2d 730 (1981); *Office of Disciplinary Counsel v. Suher*, Pa. —, 426 A.2d 1138 (1981).

Exhibit 2

Cite as, Pa., 426 A.2d 104

OPINION OF THE COURT

O'BRIEN, Chief Justice.

This is an appeal from an Order imposing judgment of sentence entered in the Court of Common Pleas of Blair County. On January 31, 1977, appellant was convicted by a jury of murder of the first degree, criminal conspiracy (murder) and other related offenses. The jury sentenced appellant to death. Post-verdict motions were filed, argued and denied. On January 4, 1980, our decision in *Commonwealth v. Moody*, 476 Pa. 220, 382 A.2d 442 (1977) having intervened, appellant was sentenced to life imprisonment. The relevant facts are as follows.

On March 11, 1976, during the course of an armed robbery at the Sheetz Oil Company, a gasoline station located in Antis Township, Blair County, Pennsylvania, at or near the Borough of Duncansville, George Karnes, an eighteen year-old attendant, was shot five times in the head and killed instantly. At the same time the cash receipts of the station were taken. There were no witnesses to this incident.

The following day, March 12, 1976, appellant, Jeffrey Joseph Daugherty, together with an accomplice and subsequent co-defendant, Beanie Dean Heath, was apprehended in the Commonwealth of Virginia shortly after an armed robbery in that state. At the time of arrest appellant and his co-defendant were traveling in an automobile which was subsequently identified as having been used in Blair County, and which contained the handgun which was used in the Karnes murder as well as other tangible objects connected with various Blair County crimes.

On December 8, 1976, appellant was convicted by a jury in the Court of Common Pleas of Blair County of murder of the first degree. This conviction was for appellant's participation in an unrelated matter: the robbery-murder of Mrs. Elizabeth Shank.

On December 10, 1976, appellant filed a petition for change of venue in the instant matter. A hearing thereon was held January 7, 1977, and the petition was denied by the trial court on January 10, 1977. Trial on the instant matter commenced January 17, 1977.

Appellant now advances seventeen assignments of error; with two of appellant's claims we agree and, accordingly, reverse.[1]

Among appellant's assertions of error is one which assails the trial court's denial of his petition for change of venue. Neither party to the instant appeal denies that both the Shank murder trial and the trial of the instant case were attended by a significant amount of news media coverage. Indeed the record of the change of venue hearings[2] precludes any conclusion but that the publicity surrounding these trials was very extensive. Moreover, there is no allegation in this case that the pre-trial publicity was sensational; appellant apparently concedes the Commonwealth its point that the complained of publicity was largely factual and objective. Nevertheless, appellant claims the publicity was inherently prejudicial.

[1-3] It is, of course, established that the grant or denial of a change of venue is a matter within the sound discretion of the trial court. *Commonwealth v. Richardson*, 476 Pa. 571, 383 A.2d 510 (1978). A trial

1. Because of our disposition of this case we do not address appellant's remaining assignments of error. That the trial court erred in failing to sequester the jury; that the court erred in denying pre-trial motions to suppress; that appellant's right to speedy trial was abridged; that it was error to exclude certain prospective jurors for cause; that the court erred in denying a motion for mistrial based upon newspaper publicity; that it was error to permit a Commonwealth witness to testify; that the court erred in denying defense request to inspect police notes; that the court erred in admitting certain prosecution evidence; that it was error to deny appellant's demurrer to murder of the first degree; that the court erred in permitting testimony concerning the victim's reputation for peacefulness and nonviolence; that the court made various errors in its charge to the jury; that the court erred in not permitting appellant's grandfather to testify concerning appellant's lack of maturity; and that the court erred in admitting two photographs.

2. The Shank murder trial was preceded by a change of venue hearing as well.

court's ruling on a motion for change of venue will, consequently, be reversed only where there is an abuse of that discretion. *Id.* However, we reaffirmed in *Commonwealth v. Rigler*, 448 Pa. 441, 412 A.2d 846 (1980), that there may occasionally be instances where the pre-trial publicity is so pervasive and inflammatory as to be inherently prejudicial. *See, Commonwealth v. Rolison*, 473 Pa. 261, 374 A.2d 500 (1977); *Commonwealth v. Frazier*, 471 Pa. 121, 369 A.2d 1224 (1977); *Commonwealth v. Pierce*, 451 Pa. 190, 303 A.2d 209 (1973). In such instances, the normal requirement that a defendant demonstrate actual juror prejudice is obviated. *Commonwealth v. Rigler*, 448 Pa. 441, 412 A.2d 846 (1980); *Rolison*, *supra*.

In *Commonwealth v. Kivlin*, 267 Pa.Super. 270, 406 A.2d 799 (1979), the Superior Court articulated the law of inherently prejudicial pre-trial publicity.

"Pre-trial publicity will be deemed so inherently prejudicial as to require a change of venue only if the articles appearing were either sensational, inflammatory and slanted toward conviction, rather than factual and objective; revealed the accused has a criminal record; referred to confessions, admissions or reenactments of the crime by the accused; or derived from reports from police and prosecuting officers. Even if one of these elements exists, a change of venue is required only if the publicity has been so extensive, sustained and pervasive, without sufficient time between publication and trial for the prejudice to dissipate, that 'the community must be deemed to have been saturated with it.'" *Id.*; 406 A.2d at 803 (citation omitted).

[4] The record of the instant case discloses that in the period from November 21, 1976, to January 7, 1977, stories concerning appellant's participation in both Blair County murders were broadcast over the television and radio stations serving Blair County in which appellant's name was mentioned approximately 1200 times. During the same period the four newspapers serving Blair County carried articles, including eleven front-page stories, mentioning appellant's name approximately 400 times. The Commonwealth does not dispute that the publicity was extensive.

Additionally the publicity in the instant case, unlike that in *Kivlin*, *supra*, continued unabated until the time of trial. "So too, . . . the possibility that a period of 'cooling off' must be considered." *Commonwealth v. Cohen*, 489 Pa. 167, 413 A.2d 1066, 1072 (1980).

Included in the complained of publicity were recurrent references to appellant's prior criminality: "the couple has either been convicted or is awaiting trial on murder and armed robbery charges in Virginia and Florida during the crime spree."[1] Heavy emphasis was placed upon the fact that appellant would be required to stand trial twice in Blair County for two murders. At voir dire, all but one of the prospective jurors testified they had knowledge of the instant crime, of the prior trial, and of unresolved charges pending against appellant.

On this record, we conclude that the publicity preceding appellant's trial was, as asserted, factual and objective. That such publicity exists and even that it be widely disseminated may not only be anticipated, but is also an indispensable component of our system of justice. *See, e. g., Frazier*, *supra*. Nevertheless, where pre-trial publicity, even though objective, contains information such as prior unrelated criminal conduct, a defendant may be prejudiced thereby. This is especially so if the publicity is widespread and continues to a point proximate to trial. In such a case it is an abuse of discretion to deny a motion to change venue. Such was the case here.

Judgment of sentence reversed. Record remanded for new trial.

NIX, J., concurs in the result.

1. Venue exhibit 21.

IN THE SUPREME COURT OF FLORIDA

JEFFERY JOSEPH DAUGHERTY,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 60,709
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

RECEIVED
SEP 15 1981
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

Exh. B. 43

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IN THE SUPREME COURT OF FLORIDA

JEFFERY JOSEPH DAUGHERTY, Appellant,	)	
vs.	)	CASE NO. 60,709
STATE OF FLORIDA, Appellee.	)	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the following symbols will be used:

"R" - Record on Appeal.

STATEMENT OF THE CASE

On August 11, 1980, the Brevard County Grand Jury filed an indictment charging the defendant, JEFFERY JOSEPH DAUGHERTY, with the first degree premeditated murder of Lavonne Patricia Sailer, with the first degree felony murder of Lavonne Patricia Sailer (during the course of a robbery), with the first degree felony murder of Lavonne Patricia Sailer (during the course of a kidnapping with intent to commit robbery), with the robbery of Lavonne Patricia Sailer, and with kidnapping of Lavonne Patricia Sailer with intent to commit robbery. (R-290-A)

Trial by jury was set to commence on November 18, 1980, at which time, the defendant, appearing with his legal counsel, entered a plea of guilty as charged to the five counts included in the indictment against him. (R-327-332) Thereupon, a jury was examined and sworn to consider the evidence presented and render an advisory verdict of the question of capital punishment. (R-6)

On November 20, 1980, following the presentation of testimony and evidence, the jury recommended that the death penalty be imposed. (R-319,320,321) Following a pre-sentence investigation, the court, on April 27, 1981, adjudicated Daugherty guilty as to all five counts and sentenced the defendant to death for the first degree murder conviction. The

Court also sentenced Daugherty to consecutive life imprisonment terms on the robbery (Count IV) and kidnapping (Court V) charges. (R-305,315)

The Judge found two aggravating factors and rejected all of the mitigating circumstances, both statutory and non-statutory (R-311,312,313,314)

Notice of appeal was timely filed. (R-209) This appeal follows.

STATEMENT OF THE FACTS

Jeff Daugherty, on his twentieth birthday, met Bonnie Heath, a 42 year old multiple divorcee. (R-58) In February of 1976, Jeff, Bonnie Heath (his girlfriend) and Raymond Daugherty, Jeff's uncle, left Michigan and traveled to Florida to look for jobs and to visit Bonnie Heath's children. (R-43,58)

Jeff was leaving a Michigan childhood and memories of a father and a grandfather who were alcoholics; (R-66) a mother and father who abandoned him and ignored him from the age of four or five years; (R-64) a father who used to kick him in the head and take his fist and knock him out of his highchair; (R-62,63,78) of a father who was sent to prison for abusing his own children.

Ever since Jeff had been severely injured when his bike was struck by an auto when he was eight years old, he had experienced a continuous and often devastating headache. (R-61,66) Treatment had never been provided for him. (R-66) Jeff resorted eventually to taking methaqualudes to dull the effect of the headaches and obtained a large quantity before leaving Michigan for Florida. (R-66,73,189)

Always and continuously in the company of his girlfriend, over twice his age, Bonnie Heath, Jeff drove to Florida. (R-58)

Occasionally taking methaqualudes every two or three hours, Jeff, Bonnie and Uncle Raymond eventually wound up in Brevard County, Florida on March 1, 1976. (R-43,44,67,167) At about 6:00 P.M., while travelling north on U.S.1, they noticed a woman hitchhiking in the drizzling rain. (R-44,234) Uncle Raymond was dropped off at a roadside bar and Bonnie Heath and Jeff proceeded back to pick up the hitchhiker, (the victim) Lavonne Sailer. (R-44,45) After driving a short distance while Bonnie and the victim talked, Jeff stopped the car; asked her to get out, asked her if she had any money and told her she wouldn't be harmed. (R-234,235,236) At this point, Bonnie Heath brought a .22 caliber revolver out of the car, pressed it into Jeff's hands and told him "you have to shoot her". (R-49,167) Jeff shot the victim in the head, Bonnie Heath responding that he should shoot her again since "she's not dead". (R-168) Taking the woman's money, suitcases and contents, Bonnie and Jeff left the scene, picked up Uncle Raymond and continued their travels north.

In the following twelve days Bonnie and Jeff were involved in a number of crimes which eventually led to their arrest in Virginia. (R-185) Jeff pleaded guilty to most of the offenses and prior to his prosecution in the instant case, had already received prison sentences in Virginia, Pennsylvania and Florida requiring him to serve a miniumum of one hundred seven and one-half (107 1/2) years in prison before he would ever be eligible for parole. (R-187)

During the sentencing phase at the trial of the instant case, Jeff related his history of a broken homelife with no parental love or influence from his mother or abusive and alcoholic father, his father's broken promises to visit him (R-163,164), his father's abuse (R-190,191), the continual uprooting and changing of schools he experienced until he finally left school in the tenth grade. (R-191,195) Jeff told of his meeting with and the development of his relationship with Bonnie Heath (R-192,193,194) and of the domination and influence she came to exercise over him. (R-226,227)

Jeff told of his remorse for his crimes (R-195,262, 263) leading up to an attempt to take his own life while in prison in 1977. (R-196)

Father Albert J. Anselmi, the Pennsylvania State Prison Chaplain and Catholic priest, confirmed Jeff's suicide attempt and subsequent conversion to Catholocism, Baptism and Confirmation by the Catholic Bishop. (R-277,278)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF PRIOR CONVICTIONS AND OF THE FACTS AND CIRCUMSTANCES RELATING THERETO, AS AGGRAVATING CIRCUMSTANCES WHERE THE OFFENSES OCCURRED SUBSEQUENT TO THE CAPITAL FELONY FOR WHICH THE DEFENDANT WAS BEING PROSECUTED.

Appellant's argument with regard to this point is apparently substantially foreclosed in view of this Court's decisions in the cases of Elledge v. State, 346 So.2d 998 (Fla. 1977); Lucas v. State, 376 So.2d 1149 (Fla. 1979); King v. State, 390 So.2d 315 (Fla. 1980); Jacobs v. State, 396 So.2d 1113 (Fla. 1981); and Ruffin v. State, 397 So.2d 277 (Fla. 1981).

The trial court recounted seven convictions as aggravating factors in support of the death penalty. (R-311) However, each and every conviction was based on events which occurred within a twenty day period in February and March of 1976, some five years earlier. Moreover, the criminal spree occurred while the defendant was continually under the influence of methaqualudes and the domination of his combined girlfriend-mother figure, who was some twenty-two years his senior.

Only one of the offenses happened, in point of time, prior to the instant case involving Lavonne Sailer, as victim,

in Brevard County.

Had the defendant been prosecuted, pleaded guilty and convicted in this case first, before the other jurisdictions, the trial court should and would have been foreclosed from considering subsequent events.

Competing jurisdictions and the vagaries of various state laws has resulted in an unfair and capricious application to Jeff as defendant in this case.

We urge reconsideration of this Court's earlier decisions in accord with Chief Justice Sundberg's words in dissent:

> ...The unfairness of such a holding is painfully obvious in the present case where the conviction for the murder of the deputy, which actually occurred shortly after the kidnapping, robbery and death of the woman, is utilized to create a "history" of prior criminal activity when the defendant had no other criminal history. Such a holding goes against any common-sense interpretation of the phrase "history of prior criminal activity" and amounts to tortured logic in my estimation. The trial judges of our state have not interpretated this section in such a manner... Ruffin v. State, 397 So.2d 277 at page 284 (Fla. 1981)

POINT II

THE SENTENCE OF DEATH IMPOSED UPON APPELLANT IS NOT JUSTIFIED IN THAT IT IS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

Following presentation of evidence at the penalty phase, the jury returned an advisory recommendation that the death penalty be imposed. (R-321) On April 27, 1981, Judge Woodson filed his written findings of fact in support of the imposition of the death penalty. (R-311-314) In imposing the death penalty, the trial court found two aggravating circumstances: (1) That the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence; and (2) That the capital felony was committed for pecuniary gain. (R-311,312) The court further found that no mitigating circumstances were present. (R-313,314)

Appellant has addressed (1) above in discussing Point I in this brief and reincorporates that argument here. Appellant concedes (2) above but urges that the death sentence imposed upon Jeff Daugherty must be vacated. The trial court failed to consider relevant mitigating factors. A proper weighing of all the factors must result in a life sentence.

In the findings of fact to support the imposition of the death sentence, the trial court made references to each of the statutory mitigating factors, rejecting each, and then concluded no mitigating facts, statutory or otherwise, existed. (R-313,314) The trial court erred in rejecting five of the statutory mitigating circumstances and in not considering the existence of several non-statutory factors in mitigation.

Appellant lacked a significant history of prior criminal activity. Section 921.141(6)(a), Florida Statutues (1979). These findings were treated jointly in the argument under Point I of this brief.

Section 921.141(6)(b) extreme mental or emotional disturbance; (e) extreme duress or substantial domination of another; and (f) the defendant's capacity to appreciate or conform his conduct to the requirements of the law are interrelated and will be discussed together.

The record is filled with testimony showing Jeff Daugherty as a product of a broken home, physically abused by his father and then abandoned by both mother and father before the age of seven. (R-42,61,62,6..64,65,78,190,191,195) Jeff endured continual and devastating headaches from an early age, which, without proper medical treatment or diagnosis, led him to drug abuse for relief. (R-61,62,66,67,73,189) With this background of tragedy Jeff comes under the emotional and psychological influence of girlfriend/lover/mother figure, Bonnie Heath, more than twice his age. (R-42,58,67,68,69,70,192,193,

194,230,231) It was under Bonnie Heath's domineering influence, behest and instruction that the instant offense was committed. (R-167,168,234-236,238) The evidence showed it was for these reasons, combined with Jeff's use or abuse of methaqualudes, that the twenty day spree in 1976 occurred.

Surely, Judge Woodson should have recognized the existence and importance of all these interrelated factors and should have found mitigating circumstances under (b), (e) and (f) of Section 921.141(6), Florida Statutes.

Section 921.141(6)(g), Florida Statutes (1979), provides that the age of the defendant at the time of the offense can be considered in mitigation. The trial court summarily rejected this factor with the terse comment that "The defendant was in his majority at the time of the commission of the crime of murder." (R-314)

This court has held on several occasions that a young age is mitigating, especially where coupled with other mitigating circumstances. See Sullivan v. State, 303 So.2d 632 (Fla. 1974) (Overton, Jr. concurring: age 25 with no prior record); Swan v. State, 322 So.2d 485 (Fla. 1975) (age 19); Thompson v. State, 328 So.2d 1 (Fla. 1976) (age 17 with no prior record); Meeks v. State, 336 So.2d 1142 (Fla. 1976) (age 21 with dull normal intelligence); Hoy v. State, 353 So.2d 826 (Fla. 1978) (age 22 with no prior record); Jackson v. State, 366 So.2d 752 (Fla. 1978) (age 18 with no prior record);

Mikenas v. State, 367 So.2d 606 (Fla. 1979) (age 22); Brown v. State, 381 So.2d 690 (Fla. 1980) (age 23); Neary v. State, 384 So.2d 881 (Fla. 1980) (age 18); Thompson v. State, 389 So.2d 197 (Fla. 1980); (age 26); and King v. State, 390 So.2d 315) (Fla. 1980) (age 23).

In the instant case, Appellant's age of barely twenty, coupled with his broken childhood, unstable family life and domineering influence of Bonnie Heath requires that his young age be found in mitigation.

In addition to the statutory mitigating factors clearly present in this case, the trial court erred in rejecting other matters in mitigation.

Another factor that should have been found in mitigatin is that Appellant showed remorse for his actions. Testimony during the trial from several witnesses established this factor clearly: (Raymond Daugherty R-95) (Lt. Arthur Dees (R-102) Chief Deputy Moody (R-112) (Jeff Daugherty R-195, 196,262,263, (Father Anselmi R-196,197,270,277,278).

Appellant stated that he was sorry for his actions, and that those things were not planned and he was unable to explain what made him do them. (R-195,230,231,262,263)

An additional factor that should have been found in mitigation was the Appellant's suicide attempt, conversion to Christianity and subsequent baptism and confirmation in the Catholic church. (R-196,197,265,277,278,279)

The trial court should have considered the unstable

family life of the Appellant as a further mitigating factor. The only father he did know was a physically violent and abusive drunk. Jeff was constantly uprooted from state to state, school to school, with no opportunity to enjoy or live a normal childhood and adolescence. No opportunity to experience a loving family relationship with either a father or a mother. (R-42,62,63,64,65,66,163,164,190,191,195) This troubled upbringing certainly contributed strongly to the position Jeff Daugherty finds himself in today.

Finally, the trial court, failed to consider in mitigation the important factor that at the time of sentencing, the Appellant, by virtue of consecutive sentences from courts in Virginia, Pennsylvania and Florida would not have been eligible for consideration for parole for 107 1/2 years. (R-187,188) Moreoever, had he been sentenced by Judge Woodson in this case to life imprisonment, the 25 year minimum mandatory, if made consecutive, would have placed the total miniumum mandatory time at 132 1/2 years. Surely, the trial court could and should have considered this circumstance as a mitigating factor effectively removing Jeff from society for well beyond his natural lifetime. Disregard of this circumstance condones an inhuman judgment of extermination for Jeff.

In summary, the trial court erroneously rejected all the statutory mitigating factors and ignored the plethora of non-statutory mitigating factors. Justice demands that Jeff Daugherty's sentence of death be vacated and a life sentence imposed.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the Appellant respectfully requests that this Honorable Court reverse the judgment and sentence, and remand for the appropriate relief requested in each point.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 14th day of September, 1981, to: Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida.

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IN THE SUPREME COURT OF FLORIDA

JEFFERY JOSEPH DAUGHERTY,)
Appellant,)
vs.) CASE NO. 60,709
STATE OF FLORIDA,)
Appellee.)
)

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA,
IN AND FOR BREVARD COUNTY

ANSWER BRIEF OF APPELLEE

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Exhibit 4

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STATEMENT OF THE FACTS

Appellant's Statement of the Facts is generally accurate. Appellee would add thereto the following corrections and additions.

Appellant states that Bonnie Heath was a forty-two (42) year old multiple divorcee (R 58). The record does not support this conclusion as an objection was sustained on relevancy grounds to cross-examination in this regard (R 59). Further, Appellant states that his father was sent to prison for abusing his own children. The record reflects that the child abuse incident for which Appellant's father was sent to prison involved Appellant's father's step-children not his own children (R 78).

Appellant states that he had continuous and often devestating headaches since he suffered severe injuries when his bicycle was struck by an automobile when he was eight (8) years old. Appellant was kept in the hospital only twenty-four (24) hours for observation after the accident to see if he had a concussion (R 76-77). No medical testimony was presented to establish the nature or extent of Appellant's injuries suffered as a result of this accident. However, Appellant was seen by school doctors for periodic checkups and could read, write, drive, understand things, and apparently knew what he was doing despite his alleged injuries (R 77). Appellant states that he resorted to taking methaquaaludes to dull the effect of these headaches, having obtained a large quantity before leaving Michigan for Florida (R 66, 73, 189). Appellant's uncle, Raymond Daugherty,

who traveled continously with Appellant and Bonnie Heath, was aware of Appellant taking only aspirin rather than quaaludes or other prescription drugs as medication for his headaches (R 67). Appellant's uncle could not say whether Appellant was having one of his headaches on the day of the murder of Lavonne Sailer (R 70-73). Appellant's uncle testified as to Appellant's behavior and actions when suffering from one of his headaches. Appellant's uncle further testified that Bonnie Heath would rub Appellant's temples to ease the pain when Appellant suffered from a headache. Appellant's uncle observed neither actions consistent with Appellant having a headache nor Bonnie Heath rubbing Appellant's temples on the day of the murder of Lavonne Sailer (R 80). Appellant testified during the sentencing trial but neither testified that he did in fact take quaaludes nor was suffering from a headache on the day of the murder. Appellant's explanation as to the number of and frequency which he took quaaludes was contradictory (R 197, 199, 205).

Appellant's sentencing trial testimony detailed that the murder of Lavonne Sailer was committed at Bonnie Heath's urging (R 167-168). Appellant testified he protested but complied with Bonnie Heath's urging and shot Lavonne Sailer once or twice (R 168). After Appellant and Bonnie Heath picked up Appellant's uncle after the murder, Appellant told his uncle they had driven the victim to a remote area, robbed her, and Appellant had shot her in the back of the head. Appellant did not mention any involvement by Bonnie Heath (R 46-48). Appellant, prior to the instant trial, had always maintained that Bonnie Heath and his uncle had nothing to do

with the instant murder or any of the other crimes committed during the twenty (20) day period in question (R 84).

During Appellant's statement of August 5, 1980, given to Wayne Porter, an Investigator with the State Attorney's Office in Brevard County, Florida, introduced in the sentencing trial as State's Exhibit 16 (R 93-94), Appellant alternatively argued that the murder of Lavonne Sailer occurred at Bonnie Heath's direction but that he previously had it in his mind to leave no witnesses as "A dead person can tell no tales" (State's Exhibit 16). Further, in his statement to Porter, Appellant, contrary to his sentencing trial testimony that he shot Lavonne Sailer only once or twice, stated he thought he may have shot Sailer once or twice more.

Following the instant murder, Appellant and Bonnie Heath, after traveling through Pennsylvania, were involved in a number of other crimes for which they were later arrested and prosecuted. Details of these additional crimes were elicited in the sentencing trial as relevant to aggravating and mitigating circumstances as more fully discussed in the Argument portion of this brief.

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EVIDENCE OF PRIOR CONVICTIONS AND OF THE FACTS AND CIRCUMSTANCES RELATING THERETO AS AGGRAVATING CIRCUMSTANCES WHERE ALL BUT ONE OF THE OFFENSES OCCURRED SUBSEQUENT TO THE CAPITAL FELONY FOR WHICH THE DEFENDANT WAS BEING PROSECUTED?

POINT II

WHETHER THE SENTENCE OF DEATH IMPOSED UPON APPELLANT WAS UNJUSTIFIED IN THAT IT WAS BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES OUTWEIGH THE AGGRAVATING CIRCUMSTANCES?

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT EVIDENCE OF PRIOR CONVICTIONS AND OF THE FACTS AND CIRCUMSTANCES RELATING THERETO AS AGGRAVATING CIRCUMSTANCES WHERE ALL BUT ONE OF THE OFFENSES OCCURRED SUBSEQUENT TO THE CAPITAL FELONY FOR WHICH THE DEFENDANT WAS BEING PROSECUTED.

Appellant argues that the trial court improperly considered Appellant's seven (7) other convictions as an aggravating circumstance pursuant to § 921.141(5)(b) Fla. Stat. (1979). Appellant notes that the trial court relied on Appellant's other convictions to support its finding of the aggravating circumstance pursuant to § 921.141(5)(b) and its rejection of a mitigating circumstance pursuant to § 921.141(6)(a) (R 311-313). However, Appellant contends that since each and every conviction was based on events which occurred within a twenty (20) day period in February and March of 1976, and only one (1) of the offenses occurred prior to the instant capital felony, the convictions afforded an insufficient basis for a finding that the defendant was "previously convicted" or had a significant "history of prior criminal activity". Appellant notes that his argument with regard to this point is apparently substantially foreclosed in view of this Court's decisions in Elledge v. State, 346 So.2d 998 (Fla. 1977); Lucas v. State, 376 So.2d 1149 (Fla. 1979); King v. State, 390 So.2d 315 (Fla. 1980); Jacobs v. State, 396 So.2d 1113 (Fla.

1981); and Ruffin v. State, 397 So.2d 277 (Fla. 1981).

Initially, Appellee would submit that Appellant does not have standing to raise this issue on appeal. An examination of the record on appeal and the Order of Judgment and Sentence containing the findings of fact in support of imposition of the death penalty reflects that Appellant had been previously convicted in Flagler County, Florida, for one (1) capital felony, the commission of which also occurred prior in time to the commission of the instant capital felony. (R 311) Thus, even assuming Appellant's argument to have some merit, the Appellant in the instant case is not aggrieved by the consideration of convictions resulting from offenses committed contemporaneously with or subsequent to the instant capital felony in that the one (1) capital felony committed in Flagler County prior to the commission of the instant capital felony in Brevard County would have been sufficient to afford a basis for a finding of an aggravating circumstance and the rejection of a mitigating circumstance pursuant to § 921.141 (5)(b) and (6)(a), Fla. Stat. (1979), respectively.

Further, Appellant had no objection during the sentencing trial to the introduction into evidence and consideration of court records to document the prior convictions. State's Exhibits 18 and 19, reflecting Appellant's conviction for first degree murder in Flagler County, Florida, were received without objection (R 111). State's Exhibit 17, reflecting Appellant's conviction for first degree murder in Volusia County, Florida, was received without objection (R 101). State's Exhibits 28 and 29, reflecting Appellant's convictions fc robbery, aggravated assault, simple assault

aggravated assault, burglary, robbery, firearms violations, criminal homicide, robbery, criminal conspiracy, criminal homicide, criminal conspiracy, robbery, and other firearms violations in the four (4) Pennsylvania episodes were received without objection (R 153-154). State's Exhibits 30 and 31, reflecting the Appellant's convictions for armed robbery and use of a firearm during the commission of a felony in Buckingham County, Virginia, were received without objection and pursuant to stipulation of counsel (R 147-157). Appellant having failed to interpose a timely and proper objection to the consideration of the records documenting the prior convictions, Appellant should not be heard to complain on appeal that the trial court improperly considered said materials, basing his finding of the aforementioned aggravating circumstance and in rejection of the mitigating circumstance thereon.

In any event, Appellant's contention that only prior crimes rather than prior convictions may properly be considered as an aggravating circumstance does not comport with logic. A plain reading of the statute reflects that the legislature referred to previous convictions and not previous crimes. Elledge, supra. The legislative intent is clear that any violent crime for which there is a conviction at the time of sentencing should be considered as an aggravating circumstance. Prior convictions in existence at the time of sentencing is a normal factor considered in all sentencing and is generally recognized as appropriate in sentencing guidelines. King, supra.

Although not directly raised by Appellant, it is of

no consequence that the identity of the person named in State's Exhibits 17, 18, 19, 28, 29, 30 and 31 was not conclusively demonstrated to be Appellant by resort to fingerprints. Clearly, the identification of Appellant by the various witnesses testifying to lay the predicate for the introduction of these exhibits was sufficient to establish identity. Any question regarding the sufficiency of the identification then became a matter of rebuttal for Appellant to raise. Francois v. State, No. 54,461 (Fla. October 15, 1981) [1981 FLW 607]. The trial court properly considered Appellant's prior convictions even though, according to Appellant's testimony, they were on appeal at the time of the sentencing trial in the instant case (R 255). Ruffin, supra. Appellant contends, in his statement of the point on appeal without argument relating thereto, that the trial court erred in allowing the state to present evidence of the facts and circumstances relating to the prior convictions of Appellant. Presentation and consideration of the details of the other murders occurred without Appellant's objection. The details of the other crimes were properly considered to "engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his particular case." Elledge, supra, at 1001; Francois, supra.

By his citation to the dissenting opinion of Chief Justice Sundberg in Ruffin, Appellant also urges reconsideration of the propriety of allowing considerarion of crimes committed contemporaneously with or subsequent to the capital felony under consideration to negate the mitigating circumstance pursuant to § 921.141(6)(a). Clearly, as noted by this Court in Ruffin, "prior"

criminal activity means prior to sentencing and not prior to the commission of the capital felony under consideration. Any other construction of "prior", as advanced by Ruffin and the Appellant in the instant case, is unreasonable and ignores the clear legislative intent. As this Court noted in Ruffin, such a position is unreasonable:

> . . .particularly in view of the fact that a defendant may have committed a murder for which he is not apprehended until many years later and during the course of these years he may have a large history of significant criminal activity. Ruffin's position would prevent the court from negating this mitigating circumstance by considering the defendant's criminal activity occurring after the commission of the murder. This interpretation would thwart the legislature's intent when it established this mitigating circumstance. Id. at 283.

The trial court properly considered the evidence presented in the sentencing trial of Appellant's prior convictions and the facts and circumstances relating thereto. Appellant does not have standing to contest the application of the aggravating circumstance pursuant to § 921.141(5)(b) to his case in that the capital felony in Flagler County was both a prior conviction and committed prior to the instant capital felony. Thus, even if Appellant's argument in this regard were to have merit, the trial court properly found the existence of this aggravating circumstance based solely upon the Flagler County conviction. Finally, Appellee would submit that Appellant's position, as he notes, has previously been considered and rejected by this Court.

Appellant having failed to demonstrate any sufficient basis for this Court to recede from its prior decisions, the finding of an aggravating circumstance pursuant to § 921.141(5)(b) and the rejection of a mitigating circumstance pursuant to § 921.141(6)(a) were proper.

POINT II

THE SENTENCE OF DEATH IMPOSED UPON APPELLANT WAS JUSTIFIED IN THAT IT WAS NOT BASED UPON INAPPROPRIATE AGGRAVATING CIRCUMSTANCES, MITIGATING CIRCUMSTANCES SHOULD NOT HAVE BEEN FOUND, AND THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES.

At the close of both the state's and Appellant's case in the sentencing trial, the jury returned an advisory recommendation that the death penalty be imposed (R 321). The Honorable J. William Woodson, Circuit Judge, in his Order of Judgment and Sentence filed April 27, 1981, submitted his written findings of fact in support of the imposition of the death penalty (R 311-314). The trial court found aggravating circumstances pursuant to § 921.141(5)(b) and (f), Fla. Stat. (1979). The trial court further found that no mitigating circumstances were present (R 313-314).

Appellant relies on his argument in Point I of his brief in support of the position that the trial court erred in finding an aggravating circumstance pursuant to § 921.141(5)(b). Therein, Appellant noted that his position had been previously considered and rejected by this Honorable Court but merely urged reconsideration of this Court's position. Appellee would rely on the argument presented in Point I of its brief and the authorities cited therein. Appellant concedes the propriety of a finding of an aggravating circumstance pursuant to § 921.141(5)(f). Notwithstanding the foregoing, Appellant contends that the trial court

erred in failing to find mitigating circumstances, the consideration of which, if found, would have resulted in the imposition of a life sentence rather than the death penalty.

Appellant contends that the trial court erred in rejecting five (5) of the statutory mitigating circumstances and did not consider the existence of several nonstatutory factors in mitigation. Appellee contends that the trial court properly rejected these mitigating circumstances and considered nonstatutory mitigating circumstances but rejected same.

The Appellant had a significant history of prior criminal activity such that the trial court properly rejected a mitigating circumstance pursuant to § 921.141(6)(a). The prior convictions detailed in support of an aggravating circumstance pursuant to § 921.141(5)(a) properly afford a basis for rejection of the instant mitigating circumstance. The trial court expressly relied on the prior convictions which included four (4) previous murders, all of which were committed during the course of robberies (R 313). Appellee has previously addressed this issue in Point I of its brief and will rely on the argument and authorities presented therein.

The Appellant did not commit the instant capital felony while he was under the influence of extreme mental or emotional disburbance, extreme duress or under the substantial domination of another person, or when his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired such that the trial court properly rejected mitigating circumstances pursuant to § 921.141(6)(b), (e) and (f).

In support of his contention that he suffered from extreme mental or emotional disturbance such that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, Appellant argues that testimony about Appellant's headaches and drug use was sufficient to require the trial court to find the existence of these two (2) mitigating circumstances. Appellant's uncle testified that Appellant had serious head injuries as a child as a result of an accident in which Appellant was hit by a car while riding his bicycle. Appellant allegedly had possible brain damage as a result (R 61). Further, Appellant's father use to kick Appellant in the head up until age four (4) or five (5) (R 62). From the time of the bicycle/car accident, Appellant had continuous headaches (R 66). However, Appellant was kept in the hospital only twenty-four (24) hours for observation after the accident to see if he had a concussion (R 76-77). No medical testimony was presented to establish the nature or extent of Appellant's injuries suffered as a result of this accident. However, Appellant was seen by school doctors for periodic checkups and could read, write, drive, understand things, and apparently knew what he was doing despite his alleged injuries (R 77).

Appellant's uncle was aware of Appellant taking only aspirin rather than quaaludes or other prescription drugs as "medication" for his headaches (R 67). Appellant's uncle could not say whether Appellant was having one of his headaches on the day of the murder of Lavonne Sailer (R 70-73). When Appellant did have his headaches, he would complain frequently and loudly about them and Bonnie Heath, Appellant's companion, would rub his temples

to ease the pain (R 70-73). Appellant's uncle testified that Appellant did not complain that he was having a headache on March 1, 1976, nor did Appellant scream out in pain, yelling that his head was killing him as was his custom when suffering from one of these headaches. Appellant's uncle did not observe Bonnie Heath rubbing Appellant's temples for him on the day of the murder (R 80).

The Appellant never said he was suffering from one of these headaches on the day of the murder or that all of the crimes committed during the twenty (20) day period in question were committed while he was having headaches (R 189, 203). Appellant's testimony regarding the headaches was insufficient to establish that the effect of headaches was such as to impair his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Rather, when Appellant's uncle was picked up by Appellant and Bonnie after the instant murder, Appellant acknowledged killing someone and indicated that he did not want to be apprehended. This acknowledgement and indication was indicative of Appellant's knowledge that he had committed a crime (R 81).

Appellant testified that he frequently took quaaludes as "medication" for his headaches. Appellant at one point testified that he took three (3), four (4), or five (5) quaaludes per day during the twenty (20) day period in question but also testified he had taken only thirty (30) in the entire twenty (20) day period (R 197). Appellant's uncle knew of Appellant taking only aspirin for his headaches and indicated that Appellant took his

"medication" occasionally every two (2) hours but that it was unusual for it to be so often (R 67, 73). Appellant was further inconsistent in his explanation as to when he had run out of quaaludes, indicating at one point that he had run out on March 11 but subsequently stating that he had taken the last of the quaaludes after he had been apprehended in Virginia (R 199, 205). It is perhaps most important to note that Appellant himself never testified that he did in fact take quaaludes on the day of the murder.

During cross-examination by the prosecutor, Appellant indicated that he did not think his headaches were a mitigating circumstance (R 228). Appellant was unable to express an opinion as to whether his lack of education or the beatings allegedly administered to him by his father were mitigating circumstances in the instant offense (R 229).

Certainly, mitigating circumstances pursuant to § 921.141 (6)(b) and (f) may be established by resort to medical or psychiatric evidence. Jones v. State, 332 So.2d 615 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Mines v. State, 390 So.2d 332 (Fla. 1980); McCrae v. State, 395 So.2d 1145 (Fla. 1981). This was not done in the instant case. Appellant sought to establish these mitigating circumstances through reliance on lay testimony only. All cases previously considered by this Court dealing with these mitigating circumstances appear to involve extreme medical, psychiatric, or personality disorders supported by medical testimony and records and the propriety of accepting or rejecting said circumstances in light

thereof. Appellant certainly has not cited to this Court any case in which the rejection by the trial court of these mitigating circumstances was held improper where the Appellant relied only on lay testimony to establish the circumstances.

The instant case does not present a situation where the trial court failed to even consider the available evidence relied upon by Appellant in support of his argument that these two (2) mitigating circumstances were present. This Court has previously ruled that failure to even consider such evidence may require a death sentence to be vacated and the cause remanded to the trial court to reconsider such circumstances. In Mines, supra, all psychiatric testimony confirmed that the Appellant was competent to stand trial. Although rejecting a claim by Appellant that he was only chemically competent to stand trial, this Court nonetheless noted that his mental condition was severe enough that the trial court should have considered such matters in mitigation. This Court noted:

> We find unrefuted medical testimony in this record which reflects that appellant had a mental condition diagnosed as schizophrenia, paranoid type. This condition was severe enough to require the trial judge to initially find the appellant incompetent to stand trial until his mental condition could be brought under control by medication at the state hospital. Under the provisions of § 921.141(6), Florida Statutes (1975), there are two mitigating circumstances relating to a defendant's mental condition which should be considered before the imposition of a death sentence. . .From the record it is clear that the trial court properly concluded that the appellant was sane, and the defense of not guilty by reason of insanity was inappropriate. The

> finding of sanity, however, does not eliminate consideration of the statutory mitigating factors concerning mental condition. The evidence clearly establishes that appellant had a substantial mental condition at the time of the offense. We have reduced death sentences imposed by the trial court to life imprisonment where the jury had recommended a life sentence on the basis of strong evidence of a mental disturbance including the specific type of mental condition reflected by the medical evidence in this cause. . .The trial court erred in not considering the mitigating circumstances of extreme mental or emotional disturbance under § 921.141(6)(b) and the substantial impairment of the capacity of the defendant to appreciate the criminality of his conduct under § 921.141(6)(f). These circumstances may not be controlling, but they were present in this cause and should have been considered. Id. at 337.

The record in the instant cause in no way reflects a mental condition supported by either medical or psychiatric testimony, much less a condition of the severity noted in Mines. Further, the record clearly reflects that the trial judge considered what evidence was presented in support of the circumstances but specifically rejected same (R 311-313). Further, the advisory jury must have rejected mitigating circumstances under § 921.141(6)(b) and (f), as evidenced by their recommendation of imposition of the death penalty. Thus, the instant case may be distinguished from McCrae where the jury must have found the circumstances to exist even though the trial court rejected said circumstances.

Where objective factors, including actions indicative of a knowledge of his wrongdoing, demonstrate that the Appellant was not suffering from an impaired capacity or extreme emotional

disturbance at the time of the commission of the capital felony, even where the appellant has a prior medical history of severe emotional problems, unlike the Appellant in the instant case, these mitigating circumstances may properly be rejected by the trial judge. An allegation that usage of alcohol and drugs resulted in the alleged severe emotional or mental distrubance or impaired capacity may be summarily discounted where the Appellant's own actions or statement refute such a claim. Stone v. State, 378 So.2d 765 (Fla. 1980). In Stone, the Appellant's behavior in cleaning up the blood, preparing to flee and leaving the area, demonstrated his awareness that his act was wrong. Further, in his statement, Stone specifically discussed the fact that he was in trouble and the advisability of leaving town shortly after the killing. Appellant in the instant case acknowledged that he had killed the hitchhiker and indicated that he did not want to be apprehended (R 47, 91). Appellant told his uncle that the woman seen hitchhiking along the side of the road would be one hitchhiker who would not make it home (R 47). The defendant was not upset, although he displayed some animosity toward Bonnie Heath, but instead appeared cool. The appellant told his uncle that they had driven the victim to a remote area where he told the victim to get out of the car, took fifteen dollars ($15.00) from her shoe prior to walking her back into the dump, ordered the woman to put her hands over her ears and shot her in the back of the head. Appellant included additional details in the description of the homicide to his uncle. The Appellant told his uncle that the victim had been from Washington. Further, he had forgotten the gun and Bonnie had to bring it to him before he could shoot the hitchhiker.

(R 47-48).

Appellant seeks to emphasize the entire twenty (20) day criminal episode in support of his position that Appellant suffered from an extreme mental or emotional disturbance or impaired capacity. However, the Appellant's memory of the events and the detailed actions taken to travel from one state to another to avoid apprehension militate against such a construction. Thus, like Stone, the Appellant's own actions and statements refute his claim of severe emotional or mental disturbance or impaired capacity. It lies within the province of the trier of fact to weigh the evidence presented as to each mitigating circumstance. Where the jury and the judge had the opportunity to hear the testimony, and apparently concluded that the testimony as to such mitigating circumstances should be rejected, this Court should not substitute its judgment in the absence of a clearly erroneous rejection of the mitigating circumstances. Lucas, supra.

Appellant further argues that the trial court erred in rejecting a mitigating circumstance pursuant to § 921.141(6)(e) alleging that he was under the substantial domination of Bonnie Heath at the time of the commission of the instant capital felony. In support thereof, Appellant suggests that it was under Bonnie Heath's domineering influence, behest and instruction that the instant offense was committed. Appellant further relied on the details of the twenty (20) day criminal episode as to Bonnie Heath's involvement and influence in an effort to demonstrate that he was under her substantial domination at the time of the murder of Lavonne Sailer.

Appellee contends that the evidence was insufficient to establish that Appellant was under extreme duress or the substantial domination of Bonnie Heath. Appellant was the trigger man or the individual to administer the blows by fist or knife in all cases but one. Only in the Volusia County case where Betty Campbell was stabbed to death was there any evidence that Bonnie Heath had actually participated in the killing or beating (R 169). Appellant himself, prior to the sentencing trial in the instant case, had always maintained that Bonnie had nothing to do with the crimes committed during the twenty (20) day period (R 84). Officer Barry S. Bidelspach of the Pennsylvania State Police Department testified to a statement made by Appellant when Bidelspach was returning Appellant to Pennsylvania after his arrest in Virginia. Appellant stated that he alone had committed the murder of Elizabeth Shank at Jack's Quick Market and that Bonnie Heath was back at the motel at the time he committed the crime (R 127-128). Further, Bonnie Heath was in the car waiting for him when he killed George Carnes at Shaw Oil Company (R 129). Appellant further stated that he alone was responsible for the Ricche's Music Store offenses and the Carrie's Cafe offenses (R 136-137). Appellant finally stated that Bonnie Heath was outside in the car when he committed the robbery of Doris Whorley in Virginia (R 160). Appellant testified during the sentencing trial emphasizing Bonnie Heath's involvement in an effort to minimize his own. However, Appellant at best presented conflicting evidence on this issue which the advisory jury and trial court properly were entitled to reject.

It was Appellant's idea to stop and pick up the hitchhiker,

Lavonne Sailer. Appellant suggested that she be given a ride so that his uncle would have a traveling companion (R 49). No testimony was elicited during the sentencing trial to establish that Bonnie Heath suggested or ordered that the hitchhiker be picked up and robbed. Appellant's uncle testified that Appellant was in constant company with Bonnie Heath during the twenty (20) day time period considered herein but was not allowed to offer an opinion as to whether Bonnie Heath was a domineering influence on Appellant (R 57-58), 67-69).

Despite Appellant's claim that he was under the substantial influence of Bonnie Heath, he testified of several occasions where he did not comply with her wishes. Appellant's own testimony contradicts his claim that his actions should be less blameworthy because of her influence in that he clearly had the will to disregard her orders or instructions when he so desired. During the murder of Lavonne Sailer in Brevard County, considered herein, Appellant testified Bonnie Heath told him he had to shoot Lavonne Sailer. Appellant claims he protested but shot anyway. However, Bonnie Heath exhorted him, as Appellant walked away, to finish the job, yelling that Sailer was not dead. Appellant ignored her stating, "If she's not dead, then she soon will be. I just want to get out of here. Let's go" (R 168). Inconsistently, Appellant's statement given to Porter, State's Exhibit 16, reflected that he complied and shot Lavonne Sailer once or twice more. Further, despite his claim of substantial domination by Bonnie Heath, Appellant nonetheless had it in mind to leave no witnesses as "A dead person can tell no tales" (State's Exhibit 16).

Appellant again chose to ignore Bonnie Heath's command to

kill during the Volusia County robbery of Betty's Pizza and murder of the owner, Betty Campbell. Appellant testified that Bonnie Heath urged him to kill Betty Campbell since she could testify against them in any robbery prosecution. Appellant testified that he did stab Betty Campbell one (1) time but apparently did not complete the task to Bonnie's satisfaction. Appellant laid the knife on the counter with the towel still wrapped around the handle. Appellant testified that Bonnie shook her head and stated that Campbell was not yet dead. Bonnie Heath then took the knife and stabbed Campbell several more times before Appellant had to grab her arm, literally take the knife out of her hand and pull her out of the building (R 170).

Appellant testified he killed Betty Shank, in the Jack's Quick Mart robbery, because he was panicked (R 180). Appellant made no mention of any orders, threats or directions given by Bonnie Heath to commit this murder. The same may be said of the murder of George Carnes (R 183).

Bonnie Heath, according to the sentencing trial testimony, was approximately four (4) feet eleven (11) inches in height, weighing one hundred ten (110) to one hundred twenty (120) pounds. Appellant, at the time of the commission of the instant homicide, was five (5) feet eleven (11) inches in height, weighing one hundred eighty (180) pounds. Appellant was active in the martial arts, stating during trial in Pennsylvania that his hands and feet were licensed as they were deadly weapons (R 219-220). Appellant himself testified he believed Bonnie to be a factor or a reason why he committed the five (5) murders but later testified the only reason for the commission of the murders of Lavonne Sailer and the

others was to get money (R 231). Appellee does not contend that Bonnie Heath played no role in the twenty (20) day crime spree. However, Appellee would submit that Appellant by his own statements and actions demonstrated Bonnie Heath was not a substantial dominating influence upon him. Appellant does not argue that he acted under extreme duress and no evidence was presented to establish that Appellant was subjected to any threats or force by Bonnie Heath.

The testimony establishing Appellant's involvement, his ability to withstand or ignore Bonnie Heath's orders or requests, and his prior statements certainly afforded a sufficient basis for the trial court to reject a mitigating circumstance pursuant to § 921.141(6)(3). In Thompson v. State, 389 So.2d 197 (Fla. 1980), this Court considered a claim that the trial court improperly rejected a mitigating circumstance based upon a claim of substantial domination of another. Therein, Thompson claimed he was under the substantial domination of Surace but testified at the Surace trial that he himself was responsible for the entire incident. Just as the trial judge was not required to ignore Thompson's testimony at the Surace trial that he himself was responsible, and thus the record did not support a claim that the trial judge had ignored the evidence of Surace's domination of appellant, the trial judge in the instant case was not required to ignore Appellant's prior statements and testimony wherein he took responsibility claiming that Bonnie had nothing to do with any of the murders. This is not a case where the advisory jury returned a recommendation of life imprisonment, apparently finding some substantial domination although not amounting to a legal defense of coercion or duress, but the trial court nonetheless rejected this

mitigating circumstance. See Goodwin v. State, No. 55,086 (Fla. July 30, 1981) [1981 FLW 558]. Here, the advisory jury and judge both had an opportunity to hear the testimony and apparently concluded that the testimony offered to establish this mitigating circumstance should be rejected. This rejection is not clearly erroneous, and thus, this Court should not substitute its judgment for that of the trial court.

Appellant next contends that a mitigating circumstance pursuant to § 921.141(6)(g), Fla. Stat. (1979), should have been found. Appellant argues that the age of the Appellant should have been considered in mitigation and the trial court erred in summarily rejecting this factor (R 314). The record reflects that Appellant was twenty (20) years of age at the time of the homicide and was emancipated from his grandparents, who raised him (R 52). Appellant left his wife and children in Michigan to travel to Florida with Bonnie Heath and his uncle. Although some testimony was presented to show Appellant was a slow learner, other testimony established that his difficulties in school resulted from his resentment of authority (R 82-83). There was no evidence presented to show any mental deficiency which would establish any discrepancy between Appellant's chronological and mental ages. In that Appellant had been emancipated from his surrogate parents, was living with his wife and children in Michigan, was of presumably average intelligence as no evidence was presented to establish any mental deficiencies, and had committed a prior murder in Flagler County, Florida, it cannot be seriously contended that his age was of any real significance such that the trial court erred in failing to find the existence of this mitigating circumstance. As noted by this Court in Peek v. State, 395 So.2d 492, 498 (Fla. 1981):

> Appellant argues that his age at the time of the commission of the crime should have been considered a mitigating factor. There is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing herein. . .The trial judge expressly considered but rejected appellant's age as a mitigating factor. The record supports his finding (Citaions omitted).

The record clearly supports the finding of the trial judge that Appellant's age was not a mitigating circumstance in the instant case. Previous cases in this Court have considered the propriety of a trial judge rejecting age as a mitigating factor. See Ross v. State, 386 So.2d 1191 (Fla. 1980) (fifteen years of age rejected as mitigating circumstance); Hargrave v. State, 355 So.2d 1 (Fla. 1978) (eighteen years of age rejected as mitigating circumstance); Peek, supra, (nineteen years of age rejected as mitigating circumstance); and Goode v. State, 365 So.2d 381 (Fla. 1978) (twenty-two years of age rejected as mitigating circumstance).

Appellant further contends the trial court erred in failing to find numerous nonstatutory mitigating circumstances. Appellant's remorse should have been considered as a mitigating circumstance. Appellant cites testimony elicited from several witnesses as affording the basis for the finding of this mitigating circumstance. Appellant suggests that his uncle, Raymond Daugherty, testified at R 95 of the Record as to Appellant's

remorse. Appellant's uncle never testified that Appellant felt any remorse for the killing of Lavonne Sailer and the record reference cited by Appellant was during the testimony of Wayne Porter, an investigator for the State Attorney's Office in Brevard County. Appellant further seems to confuse remorse with cooperation after arrest. Lieutenant Arthur Dees testified Appellant was cooperative by giving a detailed statement as to the Volusia County homicide of Betty Campbell but never testified as to Appellant's remorse (R 102). Appellant further confuses the testimony of Chief Deputy Moody (R 112) that Appellant pleaded guilty to the murders in Flagler County and Volusia County, Florida, with remorse. The only testimony in the sentencing trial which would have presented any possible basis for a finding of this mitigating circumstance was elicited from Appellant and Father Anselmi. Therein, Appellant claimed he was remorseful but specifically stated he felt no remorse when he was first arrested (R 195). Only during the course of the numerous trials did Appellant become remorseful. Appellant's credibility in this regard is certainly suspect where his remorse overcame him only when faced with extensive terms of imprisonment or death for his acts. The trial court could certainly have concluded that the remorse felt by Appellant was not true remorse for his acts but instead remorse for his predicament.

Appellant suggests that his jailhouse conversion should have been considered as a mitigating circumstance. Despite the questionable sincerity of a conversion under such circumstances, the advisory jury and trial judge had the opportunity to observe the demeanor of Appellant and Father Anselmi in determining what

weight should be given to Appellant's conversion. Both apparently rejected Appellant's claimed conversion for mitigation. In considering the weight to which Appellant's and Anselmi's testimony was entitled, the trial judge quite properly and reasonably could have relied upon his experience with criminal cases and the remarkable frequency with which convicted felons have jailhouse conversions. Despite Anselmi's personal belief that Appellant's conversion was sincere, he did acknowledge that at the time of Appellant's baptism into the Catholic church, Appellant had not yet been sentenced on two (2) Pennsylvania murders (R 282). Further, Appellant's personal belief that no combination of acts would ever be sufficient to justify imposition of the death penalty could and should have been considered by the advisory jury and trial judge in determining what weight to give to his testimony regarding Appellant's sincerety (R 284).

Appellant's unstable family life during his childhood was irrelevant in mitigation. Absent some connection between his early childhood and mitigating circumstances pursuant to § 921.141(6)(b), (e) and (f), Fla. Stat. (1979), Appellee would submit that his early childhood was too remote in time and irrelevant in mitigation. Appellant was emancipated from his grandparents who raised him and had a wife and children at the time he began his travels with Bonnie Heath. No testimony was elicited as to his home life with his wife and children prior to his travels. His immediate past would certainly have been far more relevant in mitigation than his early childhood unless the childhood events were demonstrated to have resulted in some extreme mental or emotional impairment.

Finally, Appellant suggests that the mandatory minimum sentences prior to parole with which Appellant was faced must necessarily have been considered in mitigation by the trial court. In making a proper character analysis of the Appellant in determining whether the ultimate penalty should be imposed, the length of time Appellant would be incarcerated if the death penalty were not imposed is only one factor to be considered. The advisory jury and trial judge could and should have properly considered that several if not all of the cases, for which Appellant had received a mandatory minimum sentence without eligibility for parole, were on appeal such that they could not conclusively be assured Appellant would be effectively removed from society for well beyond his natural lifetime. Appellant's reasoning that his other sentences required a finding in mitigation does not comport with logic. Where all other factors are equal, a defendant would be rewarded for having committed multiple capital felonies, resulting in the imposition of mandatory minimum sentences without eligibility for parole in some cases, by an automatic mitigating circumstance whereas a defendant having committed only one (1) such crime would have no such factor in mitigation.

Appellant does not contend, and the record does not reflect, that the trial court failed to consider the nonstatutory mitigating circumstances. Appellant alleges only that the trial court erred in not finding the existence of these nonstatutory mitigating circumstances. The trial court could have and did properly reject these nonstatutory mitigating circumstances. A review of the record does not reflect that this rejection was clearly erroneous.

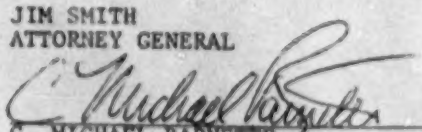
Accordingly, the trial court's findings in this regard should be affirmed. In that Appellant has conceded the finding of the two (2) aggravating circumstances and no mitigating circumstances were present, death is presumed to be the appropriate penalty to be imposed. Tedder v. State, 322 So.2d 908 (Fla. 1975).

CONCLUSION

Based on the foregoing arguments and authorities cited herein, Appellee respectfully prays this Honorable Court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Answer Brief of Appellee has been furnished to Arthur J. Kutsche, Esquire, Attorney for Appellant, at P. O. Box 1257, 503 Palm Ave., Titusville, Florida 32780, this 30th day of October, 1981.

C. MICHAEL BARNETTE
COUNSEL FOR APPELLEE

Supreme Court of Florida

FRIDAY, DECEMBER 4, 1981

JEFFERY JOSEPH DAUGHERTY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 60,709

It is hereby ordered that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in the above styled cause.

RECEIVED
DEC - 7 1981
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Louis Wainwright

Arthur J. Kutsche, Esquire
C. Michael Barnette, Esquire

SUPREME COURT OF THE UNITED STATES

KENNETH DARCELL QUINCE *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 82-5096. Decided October 4, 1982

The petition for writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Adhering to my view that capital punishment is unconstitutional under all circumstances, I would grant certiorari and vacate the death sentence on this basis alone. However, even if I believed that the death penalty could constitutionally be imposed under certain circumstances, I would grant certiorari because the decision below undermines a critical premise of this Court's conclusion that Florida's capital sentencing procedures adequately guard against the "arbitrary or capricious" imposition of death sentences. *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

Petitioner pleaded guilty to burglary and felony-murder in the first degree. As part of the plea bargain, petitioner waived his right to a sentencing recommendation by a jury and agreed that the sentence would be determined solely by the trial judge. After conducting a sentencing hearing, the judge found three aggravating circumstances and one mitigating circumstance. The judge found as aggravating circumstances that the murder was heinous, that it was committed for pecuniary gain, and that it was committed during the commission of a rape. He found as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired."

Exhibit 6

Fla.Stat.Ann. §921.141(6)(f) (Supp. 1982). The judge concluded, however, that this mitigating circumstance was "not entitled to a great deal of weight," and was outweighed by the aggravating circumstances. Accordingly, he imposed the death sentence. Petitioner appealed to the Florida Supreme Court, contending that the trial court erred in giving too little weight to the mitigating circumstance.

In its decision affirming the death sentence, the Florida Supreme Court declined to make an independent evaluation of the evidence concerning aggravating and mitigating circumstances. The court explained that its statutory duty to review death sentences does not require it to make such an evaluation:

> "Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge . . . could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, . . . and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation." 414 So. 2d 185, 187 (1982), quoting *Brown* v. *Wainwright*, 392 So. 2d 1327, 1331 (Fla.) (footnote omitted), *cert. denied*, —— U. S. ——, (1951).

Applying its deferential standard of review, the court affirmed the death sentence on the ground that "[t]he trial judge was not unreasonable in failing to give great weight" to petitioner's diminished capacity. *Ibid.* In the court's view it was significant that "[t]he trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby* v. *State*, 343 So. 2d 291 (Fla.), *cert. denied*, 434 U. S. 920 (1977)." 414 So. 2d, at 187.

The decision below undermines a fundamental premise of this Court's decision in *Proffitt* v. *Florida* upholding Florida's death penalty statute. The Florida statute, which was en-

acted in response to *Furman* v. *Georgia*, 408 U. S. 238 (1972), provides for automatic review by the Florida Supreme Court of all death sentences. Fla.Stat.Ann. § 921.141(4) (Supp. 1982). In rejecting a constitutional challenge to the statute, this Court assumed in *Proffitt* that the Florida Supreme Court's obligation to review death sentences encompasses two functions.[1] First, death sentences must be reviewed "to ensure that similar results are reached in similar cases." 428 U. S., at 258 (opinion of Stewart, POWELL, and STEVENS, JJ.); see also *id.* at 251, 253 (same). In addition,

> "the evidence of the aggravating and mitigating circumstances is *reviewed and reweighed* by the Supreme Court of Florida 'to determine *independently* whether the imposition of the ultimate penalty is warranted.' *Songer* v. *State*, 322 So. 2d 481, 484 (1975). See also *Sullivan* v. *State*, 303 So. 2d 632, 637 (1974)." 428 U. S., at 253 (opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added).

On the basis of this understanding of the Florida Supreme Court's duty to review death sentences, this Court concluded that the risk of "arbitrary or capricious" imposition of death sentences was "minimized by Florida's appellate review system." *Ibid.*[2] The Florida Supreme Court subsequently confirmed this Court's understanding of the standard of re-

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[1] Since the statute does not specify the standard of review, the Court relied in *Proffitt* on Florida Supreme Court decisions interpreting and applying the mandatory review provision.

[2] There can be little doubt that the joint opinion of Justices Stewart, POWELL and STEVENS placed particular emphasis on the independent evidentiary review performed by the Florida Supreme Court. The opinion stresses that the Florida Supreme Court "has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." 428 U. S. 242, 253 (1976). In one of the cases cited in support of this assertion, *Halliwell* v. *State*, 323 So. 2d 557, 561 (1975), the Florida Supreme Court stated: "As required by statute, we have *weighed* both the aggravating and the mitigating circumstances as shown in the record, and we conclude that the death penalty is not warranted." (Emphasis added).

view when it stated that its "responsibility [is] to *evaluate anew* the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." *Harvard* v. *State*, 375 So. 2d 833, 834 (1978) (emphasis added), *cert. denied*, 414 U. S. 956 (1979).

This is no longer a correct statement of Florida law. The decision below indicates that the Florida Supreme Court now employs a far more restricted standard of review in capital cases. So long as "sufficient competent evidence," 414 So. 2d, at 187, supports the death sentence, the Florida Supreme Court will uphold the sentence even if its "independent evaluation [would] have reached a different result." *Ibid.*

In light of the Florida Supreme Court's abandonment of its previously recognized duty to make an independent determination of whether a death sentence is warranted, the constitutionality of the Florida death penalty statute should be reappraised by this Court. It is simply no longer the case that "evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 428 U. S., at 253 (opinion of Stewart, POWELL, and STEVENS, JJ.) (citation omitted). Therefore, even if I believed that the death penalty could constitutionally be imposed under certain conditions, I would grant certiorari to decide whether Florida's death penalty statute, as reinterpreted by the Florida Supreme Court, "serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Id.*, at 260, quoting *Furman* v. *Georgia*, 428 U. S., at 310 (Stewart, J.) (concurring).

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No. 82-5879

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY

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-against-

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY

Petitioner Jeffery Joseph Daugherty submits this reply to Respondent's Brief in Opposition to the Petition for a Writ of Certiorari.

1. Respondent acknowledges that Mr. Daugherty designated "the transcription of all Court proceedings occurring in the bifurcated or sentencing phase" as the record on appeal, but claims that this designation was narrowed by the prefatory language "only so much of the proceedings as fairly supports the issues raised." Respondent's Brief in Opposition at 4. In fact, the prefatory language which Respondent construes to be limiting is nothing more than a boilerplate introduction taken verbatim from Florida Rule of

Appellate Procedure 9.140(d).* The format of the designation itself demonstrates the boilerplate nature of the preface. See R. 295 (attached as Appendix A). Finally, any doubt as to the intended breadth of the designation is dispelled by Petitioner's express instructions to the clerk of the trial court, requesting preparation of: "[t]he complete original record on appeal including, but not limited to, all indictments, motions, orders, minutes of the Court, Court Reporter's transcription of Court proceedings and exhibits entered into evidence" as the complete certified record on appeal. R. 293. Respondent also ignores the independent statutory and constitutional duty of the Florida Supreme Court to review the complete sentencing record in capital cases. See Gardner v. Florida, 430 U.S. 349, 361 (1977); Entsminger v. Iowa, 386 U.S. 748 (1967); Goode v. State, 365 So.2d 381, 384 (Fla. 1979); Delap v. Florida, 350 So.2d 462, 463 n.1 (Fla. 1977); Fla. Stat. Ann. § 921.141(4). The "issues raised" necessarily included whether, on the entire record, the sentence of death was appropriately imposed. See Petition at 8-11.

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* That rule, applicable in cases of appeal by an indigent defendant, provides:

> If a defendant's designation of a transcript of proceedings requires expenditure of public funds, trial counsel for the defendant (in conjunction with appellate counsel whenever possible) shall serve, within 10 days of filing the notice, a statement of the judicial acts to be reviewed and a designation to the court reporter requiring preparation of only so much of the proceedings as fairly supports the issues raised. Either party may file motions in the lower tribunal to reduce or expand the transcript. (Emphasis added.)

2. Respondent concedes that the record before the Florida Supreme Court did not include: (1) the sentencing arguments by counsel; (2) the jury instructions; (3) a transcript of the forty-minute taped statement by Daugherty which was played at the sentencing hearing before the jury; and (4) the jury voir dire. Respondent's Brief in Opposition at 6-7. Although Daugherty's presentence investigation report was not part of the certified record transmitted by the clerk of the trial court to the Florida Supreme Court, Respondent is correct in stating that the Florida Supreme Court requested a copy of a non-certified report directly from the Florida Department of Corrections. See Respondent's Brief in Opposition, App. 5. Petitioner's counsel has ascertained that the Florida Supreme Court did obtain a copy of a non-certified report, and Petitioner therefore withdraws that portion of his argument which rested on a contrary understanding of the record below. See Petition at 11-12.*

3. Respondent contends that the Florida Supreme Court had no duty to evaluate and weigh the evidence of aggregating and mitigating circumstances upon which Daugherty's death sentence is predicated. Respondent's Brief in Opposition at 8-9. Indeed, Respondent demonstrates that the Florida Supreme Court has systematically abandoned its previously recognized obligation to make an independent

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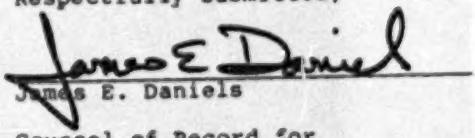
* Petitioner does note that the practice by which the Florida Supreme Court obtains non-certified reports from the Department of Corrections rather than as part of the certified record has been challenged. See Ford v. Strickland, No. 81-6200, ___ F.2d ___ (11th Cir. Jan. 7, 1983) (en banc).

determination of whether a death sentence is warranted. Under such circumstances, the Florida capital-sentencing procedures do not ensure the meaningful appellate review which this Court relied upon in upholding Florida's capital punishment system. See Proffitt v. Florida, 428 U.S. 242 (1976); Quince v. Florida, No. 82-5096, cert. denied, ___ U.S. __, 51 U.S.L.W. 3251 (October 4, 1982) (Marshall, J., dissenting from denial of certiorari). As applied to Petitioner, the Florida capital-sentencing procedures are unconstitutional. Petition at 14-15.

Dated: January 24, 1983

Respectfully submitted,



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October Term, 1982

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-against-

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this Reply upon Respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

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Sid J. White, Clerk
Florida Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Done this 24th day of January, 1983.

James E Daniel

James E. Daniels, Esq.

IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

CASE NO. 80-1478-CF-A

STATE OF FLORIDA,

Plaintiff,

vs.

JEFFERY JOSEPH DAUGHERTY,

Defendant.

DESIGNATION OF THE RECORD TO THE COURT REPORTER

TO: The Official Court Reporter
Brevard County Courthouse
Titusville, Florida 32780

COMES NOW the Defendant/Appellant, and pursuant to Florida Rules of Appellate Procedure 9.140(d), respectfully designates to the Court Reporter the following as only so much of the proceedings as fairly supports the issues raised:

The transcription of all Court proceedings occurring in the bifurcated penalty or sentencing phase of the above styled case.

Defendant/Appellant further requests of the Court Reporter that such transcripts be filed in triplicate with the Clerk of the Circuit Court within 30 days of service of this designation.

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to the State Attorney's Office and the Official Court Reporter, Brevard County Courthouse, Titusville, Florida and mailed to the Assistant Attorney General's Office, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, on this 8th day of June, 1981.

ARTHUR [illegible]
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Attorney for Defendant/Appellant

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